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THE
PRINCIPLES AND PRACTICE
OF THE
LAW OF EVIDENCE.

BY EDMUND POWELL, Esq.
OF LINCOLN COLLEGE, OXFORD, M.A., AND OF THE INNER TEMPLE,
BARRISTER-AT-LAW.

SECOND EDITION.

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PREFACE

TO THE FIRST EDITION.

In this Treatise on the Practice of the Law of Evidence I have endeavoured to state, clearly and concisely, all those principles of this branch of law which are of most frequent and practical importance in the Courts. It is apparent that a compendium of a subject which has been exhausted by such writers as Phillipps, Taylor, Starkie, and Roscoe, can have little pretension to originality; and I am bound to acknowledge the great extent of my obligation to all these authors, and especially to the elaborate works of the two former gentlemen. There are few legal topics which afford a modern writer any ground for claiming the merit of originality in the treatment of them; and I have no wish to advance any such claim. At the same time I may be permitted to disclaim all intentional plagiarism, and to state, that whenever I have

availed myself of the learning and labours of my predecessors, I have studiously acknowledged, and beg to repeat my acknowledgment of the debt. The plan of stating fundamental principles, and of illustrating them by leading cases, is, perhaps, to a certain extent, original; and I may also add, that I have endeavoured anxiously to mark distinctly the recent changes in, and existing principles of, the Law of Evidence, and to bring down the review of cases to the date of publication. The chapter on the Measure of Damages is also, as far as I am aware, a new feature in a treatise on the Law of Evidence.

E. P.

THE TEMPLE,
January, 1856.

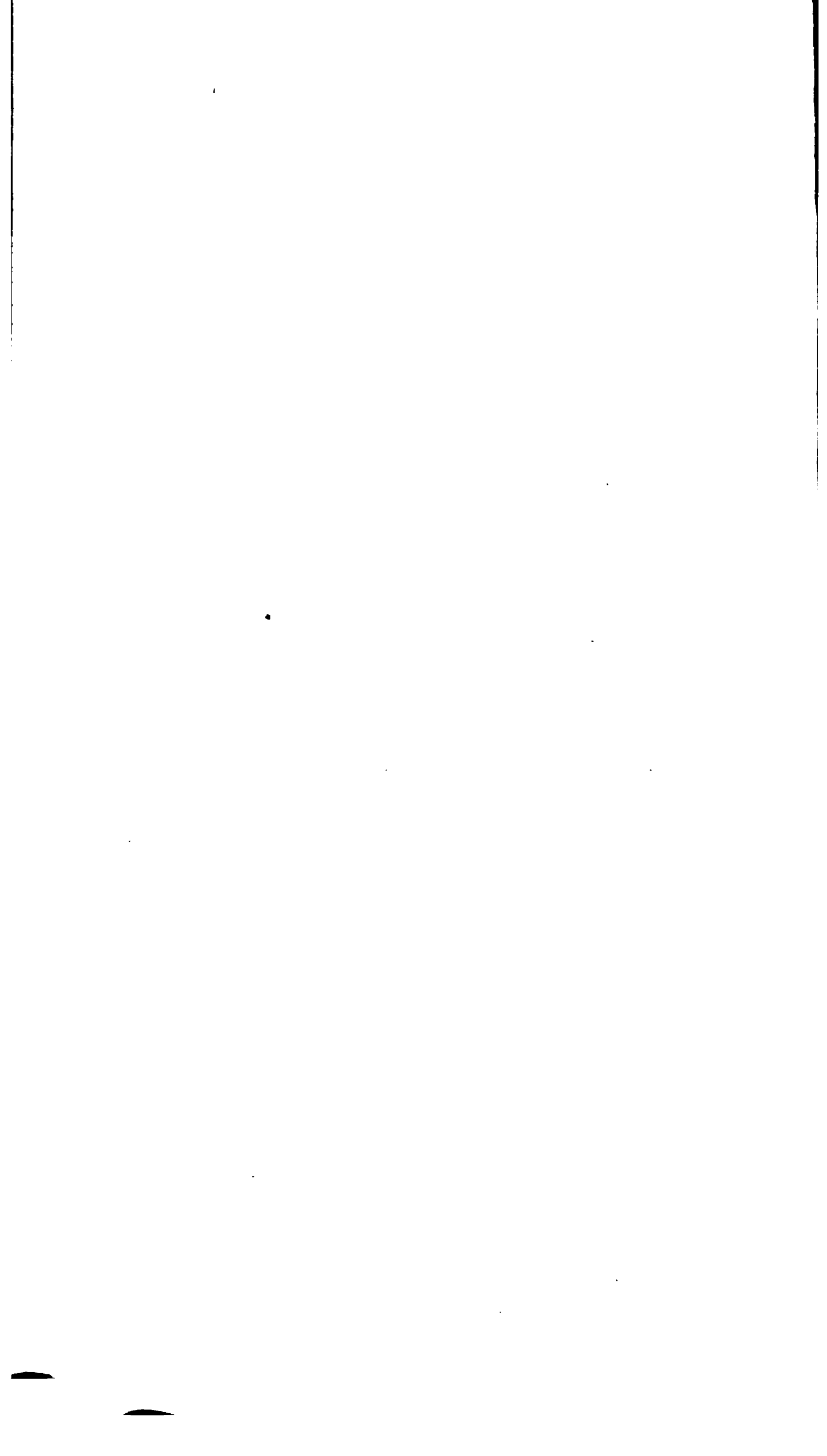
PREFACE

TO THE SECOND EDITION.

IN this second edition, I have retrenched some redundancies, corrected several errors, and supplied, as I hope, many deficiencies. I have added much original matter, and have inserted two new chapters—one on the General Issue, and another on Interrogatories. I have also endeavoured to incorporate, under their proper titles, the substance of all the cases and statutes which have become part of the Law of Evidence since the publication of the first edition.

E. P.

THE TEMPLE,
August, 1859.



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THE
PRINCIPLES AND PRACTICE
OF THE
LAW OF EVIDENCE.

CHAPTER I.

GENERAL PRINCIPLES OF EVIDENCE.

SINCE mathematical or demonstrative certainty is unattainable in any of the affairs of daily life, courts of justice, like individuals, are compelled to be satisfied with that inferior kind of evidence which is called moral. All moral science, of which law is the practical expression, consists intrinsically of inquiry and investigation, which are infinite by nature, but finite by necessity : and, in the administration of justice, the exigencies of public and private business require that this limit should be neither recondite nor fanciful, but well defined, according to the maxims and experience of common sense. Therefore moral probability, or, as it is erroneously termed, moral certainty, is the highest degree of proof to which the science of legal evidence aspires. In this respect, the analogy between ethics, or moral philosophy, and the English Law of Evidence is complete. As in ethics, and in all purely transcendental inquiries which seek for

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knowledge beyond the limits of the senses, the logical result is seldom more than a slight elevation or depression of one of two or more sets of competitive probabilities :¹ so moral philosophy, when applied to the daily business of life, and made a standard and a test of the existence or non-existence of uncertain and disputable facts, gives, as the result, only a greater or less amount of verisimilitude, or probability. The region of evidence lies, therefore, exclusively between moral certainty on the one hand, as its most perfect extreme, and moral possibility on the other, as its most imperfect extreme. It does not look for more than the first, and it will not act on less than the last. Its whole object is to produce those convictions which springspontaneously from the suggestions of the intuition, as embodied in the conclusions of the reasoning or comparative faculty of the mind ; and in every case the last conclusion of the speculative intellect rightly suggests and governs the first outward operation of the practical mind.² From such a speculative conclusion there may spring also ulterior inferences, connected strictly in a chain of cause and effect : for “if a strong probability be raised by expressevidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered.”³ But the fundamental maxims of the law of evidence are not by any means founded on the most approved principles of modern metaphysics ; for, bounded and fallible as the human senses are in their demonstration, yet the science of evidence recognizes in them its best and highest exposition. Thus, as a general rule, the English Law of Evidence may be regarded as primarily always striving after the depositions of eye-witnesses. Yet their statements, although always valuable, are so far from being, as is sometimes supposed, of a demonstrative character, that they are often intrinsically less satisfactory than

¹ Cicero De Officiis : Butler's Analogy of Religion.

² Aristotle, Eth. Nic. lib. 6.

³ Per Lord Campbell, C. J. : *Wheelton v. Hardisty*, 26 L. J. 278, Q. B. ; 31 L. T. Rep. 303.

many other grades of presumptive evidence, which are nominally inferior. Ignorance, passion, prejudice, and other constitutional infirmities of the witness, which are far beyond the sight or conjecture of either a judge or jury, may, and constantly do, without the consciousness of the deponent, distort his evidence so far as to render it absolutely worthless; although it may be delivered with perfect calmness and consistency, and even remain unshaken by the most searching cross-examination. A still more alarming ground for distrust lies in the possibility that the witness may be committing perjury; and the experience of the profession, during the last few years, has added tenfold power to this deplorable hypothesis. The recent act of the 17 & 18 Vict. c. 125, s. 20, by which witnesses professing conscientious objections to an oath may be permitted by the judge, or other presiding officer, to give evidence on mere affirmation, is not likely to lessen the suspicion with which direct evidence has always been regarded by the profession; and, although it is far from the intention of the present writer to question the wisdom of the Legislature in this case, it is necessary to refer to it at a point where the value of direct evidence is being discussed.

It is, however, universally the object of courts to obtain the *best* evidence; and, generally, direct, or original, evidence, such as has been mentioned, is considered the best. Hence *hearsay* evidence,—*i. e.* evidence which is neither the *vivâ voce* statement on oath of a witness who is present, nor the affidavit, where affidavits are admissible, of a witness who may be produced and cross-examined if necessary, and will be punished for perjury,—is generally inadmissible, because no trustworthy belief, on any matter of importance, can attach to reports of what has been said or done by an absentee, who perhaps may have spoken or acted, either fraudulently or inadvertently, without being under the religious and legal responsibilities of an oath, and without being subject to the test of a cross-examination. Also, direct evidence is viewed as being either

primary or secondary ; and it is an inflexible rule, that secondary evidence is inadmissible until the absence of primary evidence has been explained to the satisfaction of the judge. Thus, in a dispute on a contract under seal, the deed is primary evidence, and should be produced to show the terms of the contract. As long as it exists, and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received ; but if it be destroyed, or if it cannot be found after proper search ; or if an adverse party, holding it, refuse to produce it, after due notice ; then either written or oral evidence may be given by any one who is acquainted with the contents of the deed. The rule is the same in the case of written contracts, not under seal. As long as the writing exists it must be produced, if possible ; but if it be impossible to produce it, the judge may, in his discretion, allow the contract to be proved by secondary, *i. e.* by oral, evidence.

Where neither of these modes of direct evidence can be supplied, and in many cases where they can be supplied, the law permits facts to be proved by that inferior kind of evidence which is usually, but inaccurately, named presumptive or circumstantial. The term is inaccurate, because, according to the premises, even direct evidence, when analysed, is found to be presumptive, and to depend for its weight on a number of circumstantial peculiarities which affect the credibility of the witness or other proof. But presumptive or circumstantial evidence, as distinguished from direct evidence, is understood to be that species of proof which arises from the existence of a fact, and not from the deposition of a witness, or from writings which are substituted for witnesses. Thus it is a legal presumption that persons who act as public officers have been duly appointed as such. If a man be stabbed in a house, and another man be seen running from the house immediately after, with a bloody sword in his hand, the flight, the weapon, and the blood raise, in legal language, a *violent* presumption that the second

man murdered the first.¹ Similarly, in larceny, where goods have been stolen by a person unknown, and they have been found shortly after in the possession of the prisoner, juries are always told by judges, that on this evidence alone they are bound to convict, unless they are satisfied with the prisoner's explanation of the manner in which he obtained the goods. Here the evidence consists not of statements, but of inferences from facts. But on this class of evidence it has been remarked by a learned writer,² and the remark is universally applicable to all presumptive evidence, that it must be admitted that, like every other rule of human institution, it will sometimes fail to guide rightly. And Lord Hale mentions a case which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief, being closely pursued, had overtaken the man upon the road, and asked him to hold the horse for him for a few minutes. The thief escaped and the innocent man was apprehended with the horse.³ In such cases and generally it is well to bear in mind the recent language of a learned judge, that "where it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory; but there must also be some one substantial credible fact inconsistent with the contrary."⁴ Hence it has been decided lately, that since there can be no larceny of goods unless there be a felonious intention in the taker's mind at the time of the taking, a mere fraudulent conversion of goods by the taker after the taking is no evidence that he had a felonious intention at the time of taking, because such a malappropriation is consistent with the

¹ Co. Litt. 6, b.

² Russell on Crimes, by Greaves; note by editor.

³ 2 Hale P. C. 289.

⁴ Willes, J. : *Great Western Railway v. Rimmell*, 27 L. J. 201, C. P.

theory that he had no felonious intention at the time of the taking, but that he conceived the intention subsequently.¹ At the same time it is held that where the facts do not clearly destroy the supposition that there is *some* evidence, they ought, at least in civil cases, to be left to a jury.²

Such, in outline, is the double basis on which the positive principles of the Law of Evidence are founded. It is compounded equally of the credibility which arises from oral testimony, and from facts which are considered to be tantamount to oral testimony. But before considering the principles of direct and presumptive evidence in detail, it will be convenient to treat of the different functions of judge and jury in the reception of evidence ; of bills of exceptions ; of demurrers to evidence ; and of the competency of witnesses.

¹ *R. v. Christopher*, 28 L. J. 35, M. C.

² *Jewsbury v. Newbold*, 26 L. J. 247, Ex.

CHAPTER II.

ON THE FUNCTIONS OF JUDGE AND JURY.

Ad quæstionem juris non respondent juratores : ad quæstionem facti non respondent judices. Whether there is *any* reasonable evidence is a question for the judge ; but whether the evidence is *sufficient* is a question for the jury.¹

THE meaning of this rule, which may be regarded as fundamental, is, that it is for the judge to decide on the character of all evidence that may be tendered, and to admit or reject it according to its consistency or inconsistency with the established rules of courts. The latest authorities, from which the above rule is drawn, have exploded the ancient form of it, by which a judge was bound to leave a case to a jury if there were *any* evidence for their consideration. Where there is merely a *scintilla* of evidence a judge ought not to leave it to a jury.² At the same time it is a very delicate function for a judge to withdraw a case from a jury on the ground either that there is no evidence, or merely a *scintilla*; and it seems that when there is any sort of *primâ facie* presumption in a case,³ or a condition of facts which does not clearly negative the supposition that there is *some* evidence, the de-

¹ *Avery v. Bowden*, 26 L. J. 3, Q. B.; 28 L. T. Rep. 145; Sc: Cam. *Wheelton v. Hardisty*, 26 L. J. 278, Q. B.; 31 L. T. Rep. 303.

² Per Cur. : *Avery v. Bowden*, sup.

³ *Dare v. Heathcote*, 25 L. J. 245, Ex.

cision is for the jury and not for the judge.¹ The rule also must be limited by the nature of tribunals, and confined to such as are composed of the common law jurisdiction of judge and jury. Where the judge discharges at once his own peculiar functions and also those of the jury, then it will be his duty to estimate the credibility as well as the admissibility of evidence. Such is his position in Courts of Equity, and other jurisdictions which follow the practice of the Roman or civil law, although even here, under a recent act,² trial by jury is annexed to the jurisdiction of the Court of Chancery, and will of course follow the rules of common law evidence in all cases of its employment. Such also it is in the new County Courts, in cases where either a jury is not allowed, or where the parties do not require the intervention of one.³ And now, by the 17 & 18 Vict. c. 125, s. 1, it is enacted, that the parties to any cause may, by consent in writing, signed by them or their attorneys, as the case may be, leave the decision of any issue of fact to the court, provided that the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such trial; or, provided the judges of the Superior Courts of Law at Westminster shall, in pursuance of the power hereinafter given to them, make any general rule or order dispensing with such allowance, either in all cases, or in any particular class or classes of cases to be defined in such rule or order; and such issue of fact may thereupon be tried and determined, and damages assessed, where necessary, in open court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court or included in the same commission at the assizes; and the verdict of such judge or judges shall be of the same effect as the verdict of a jury,

¹ *Jewsbury v. Newbold*, 26 L. J. 247, Ex.

² 21 & 22 Vict. c. 27.

³ 9 & 10 Vict. c. 95, ss. 69, 70.

save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the court or judge, the evidence and otherwise, shall be the same as in the case of trial by jury.

By this section it will appear that the procedure of the new County Courts is so far grafted on the Superior Courts as to enable the parties to an action to dispense with a jury by leave of a judge, whenever they think that a question of fact will be decided better by a full court or a single judge.

But, subject to the exceptions which have been stated, the rule, as laid down, is strictly maintained. Thus it is for the judge to explain the law to a jury; and the jury is bound to take the law to be that which the judge tells them that it is. It is for the judge to tell them how the law is applicable to the issues of fact, and to distinguish for them questions of law from those of fact; to decide on the competency of witnesses; to examine them as to their religious belief, before they are admitted to be sworn or to affirm; and to admit or reject them according to his view of the sincerity or insincerity of their belief in a Supreme Being, who will punish them, either in this life or a future life, for perjury and falsehood.¹ It is for the judge to determine whether a witness be sane or insane; whether dying declarations, in cases of homicide, are admissible evidence as having been made by the deceased in the expectation of immediate death; whether secondary evidence may be substituted for primary evidence;² whether a document come from proper custody, or is properly stamped; and generally on all conditions precedent to the reception of evidence. But when the judge has once admitted evidence, his function is complete.³ He has nothing whatever to do with the *credibility* of evidence: but

¹ *Omichund v. Barker*, Willes, 538; 1 Sm. L. C. 195; 17 & 18 Vict. c. 125, s. 89.

² *Boyle v. Wiseman*, 24 L. J. 284, Ex.

³ *Heslop v. Chapman*, 19 L. J. 49, Q. B.

that is a consideration which is solely for a jury, where there is one.

In summing up a case to a jury the judge will, in his discretion, comment, or decline to comment, on the weight of evidence. It would appear that the latter course is his strict duty ; and that he may be regarded as *functus officio* when he has laid the real issues, and the evidence that bears on them, before the jury, and stated the law that is applicable to them. But practically this rule is not observed inflexibly; and in many cases, which consist in equal and inseparable parts of law and fact, it is found to be impossible to declare the former without revealing opinions as to the latter. But it is the custom, as it is the constitutional duty, of the most distinguished judges, to avoid, as far as possible, every remark that may bias the jury in their verdict. Thus in cases of libel it is the duty of a judge to define the law of libel to a jury, and to tell them generally what kind of written statements when published amount to a libel; but not to deliver his own opinion on the case.¹

It often becomes an important and difficult question whether a point is properly matter for the decision of the judge or for that of the jury. The general rule is more indisputable in theory than it is easy in application. In *R. v. The Dean of St. Asaph*,² Lord Mansfield said :—"Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court: where by the form of pleading, the two questions are blended together and cannot be separated upon the face of the record, there the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law;

¹ See Lord Campbell's Life of Lord Kenyon, pp. 51, 52.

² 21 How. St. Tr. 1039, 1040.

they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge in all cases of general justice to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their consciences." The leading heads of this obscure and unsatisfactory doctrine seem to be the following:—

The question of *probable* cause is for the judge, and the jury can find only the facts, and the inferences from facts, on which the theory of probability is founded.

In *Mitchell v. Williams*,¹ Alderson, B., said:—"The judge has a right to act upon all the uncontradicted facts of the case; and it is not necessary specifically to leave every fact to the jury—to ask them, for instance, 'Do you believe this?' 'Do you believe that?' 'Do you think that was so and so?' It is only where some doubt is attempted to be thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact, not distinctly sworn to, that the judge is called upon to submit any question to the jury." The same learned judge delivered a similar opinion in *Hinton v. Heather*.² Thus in an action for false imprisonment the judge is to say whether the facts afford reasonable and probable cause for arresting;³ and in an action for malicious prosecution, what circumstances show that the defendant was actuated by malice or not.⁴

Questions as to what is or is not a *reasonable* time for the performance of an act, are generally for the decision of the judge.

¹ 11 M. & W. 217.

² 14 M. & W. 134.

³ *West v. Baxendale*, 19 L. J. 149, C. P.

⁴ *Heslop v. Chapman*, 23 L. J. 49, Q. B.

Thus the judges have exercised the right to decide whether notice of the dishonour of a bill has been given within a reasonable time according to the circumstances of the case;¹ what are reasonable hours for presenting a bill for payment at a banker's;² for tendering rent;³ for delivering goods.⁴ A reasonable notice for a yearly tenant to quit has been decided to mean a notice of six months;⁵ and in the case of a domestic servant, a calendar month.⁶

On the other hand:—

Reasonable skill, due diligence, and gross negligence, are questions for a jury.⁷

Whether a surgeon has treated his patient negligently; whether a gratuitous bailee has lost his deposit by gross negligence,⁸ are examples of this rule. Thus, in *Doorman v. Jenkins*,⁹ which was an action to recover money belonging to the plaintiffs which had been lost by the defendant while in his custody as a gratuitous bailee, it was held that it was rightly left by the judge to the jury to say, on the facts, whether the defendant had been guilty of gross negligence; and Taunton, J., said:—"A great deal has been said on the question whether gross negligence is a question of law or fact. Such a question will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact; and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly; and alleges, that for his failure to do so, such and such

¹ *Stocker v. Collin*, 7 M. & W. 515.

² *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28.

³ *Startup v. Macdonald*, 6 M. & G. 593, S. C.

⁴ *Ibid.*

⁵ *Doe v. Spence*, 6 East, 120.

⁶ *Fawcett v. Cash*, 5 B. & Ad. 904.

⁷ *Tayl. s. 31.*

⁸ 2 Ad. & E. 261.

⁹ *Ibid.*

injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the court told the jury that the injurious consequences did, *in point of law*, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet even there the jury have to determine whether in point of fact the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon for negligence in the treatment of his patient. What law can there possibly be in the question whether such and such conduct amounts to negligence? That must be determined entirely by the jury."

Bona fides, actual knowledge, express malice, and real intention, are questions for a jury.¹

In *Harratt v. Wise*,² the action was on a policy of insurance of goods which had been shipped to a blockaded port and there seized. It was found by the jury that notification of the blockade had been published in the *London Gazette*, and that information of it might have reached the captain of the vessel before he arrived at the port. But it was also found that it had not reached him when he arrived there. A verdict was found for the plaintiff, and a rule for a new trial applied for, on the ground that notice in the *Gazette* was notice to all the King's subjects : and that it must be presumed that the captain knew of it. But it was refused: and Lord Tenterden in his judgment observed :—

"If the possibility or even probability of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might in some cases be contrary to the fact, and such a rule might work injustice. . . . Knowledge, like other matters, must become a question

¹ Tayl. § 32.

² 9 B. & C. 712.

of fact for the decision of a jury." So in libel and all felonies it is for the jury to pronounce on the animus or malice of the act. But

In questions whether a communication is privileged, the jury must speak to the *bona fides*; and, if they affirm it, it is a question of law whether the occasion of publication was such as to rebut the inference of malice.

Thus in actions for defamation it is matter of law for the judges to determine whether the occasion of writing or speaking criminary language, which would be otherwise actionable, repels the inference of malice, and constitutes what is called a privileged communication;¹ but if there is any evidence of malice it should be left to the jury.²

It may be stated broadly, but subject to limitations, that—

In all cases where the character of a fact depends on an inference from circumstances, the jury must pronounce on the character and the fact; but where the character of a fact depends on a latent scientific intention, there it is the duty of the jury to find the fact, and of the judge to declare its character and meaning.

Thus in an action for goods sold and delivered, where the plea is infancy, and the replication that the goods are necessaries, the jury will pronounce them to be necessaries or not necessaries according to the condition of the infant. But the court will tell the jury in such a case that the goods can only be considered necessaries so far as they are really useful and suitable

¹ *Cook v. Wildes*, 24 L. J. 367, Q. B. ; per Lord Campbell, C. J.

² *Harrison v. Bush*, 25 L. J. 25, Q. B.

to the infant's condition.¹ So the suppression of evidence, such as a will, by an adverse holder will warrant the jury in inferring that it is consistent with the case of the other party;² and generally where the facts warrant an inference the court will not disturb a verdict.³

An illustration of the second branch of this rule is found in the maxim, that—

The construction of written documents is for the judge: but the construction of peculiar or technical phrases is for the jury.

Thus the judge will instruct the jury as to the meaning of Acts of Parliament, records, deeds, wills, and written contracts generally, even where the evidence is secondary;⁴ and the jury is bound to follow his construction. In *Hutchinson v. Bowker*,⁵ Parke, B. said :—

“The law I take to be this: that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the *meaning of those expressions* was, but for the court to decide *what the meaning of the contract* was.” In that case, it was attempted to prove a contract, for the sale of barley, by letters, one of which offered *good* barley, and the other accepted the offer, “expecting you will give us *fine* barley and good weight:” and the court held that, though the jury might be asked as to the mercantile meaning of the words “*good*” and “*fine*,” yet, after having found a distinction between them, they could not further decide that the parties did not misunderstand each other; but were bound to take the inter-

¹ *Harrison v. Fane*, 1 M. & Gr. 553.

² *Sutton v. Devonport*, 27 L. J. 54, C. P.

³ *Gibson v. Doey*, 27 L. J. 37, Ex.

⁴ *Berwick v. Horsfall*, 27 L. J. 193, C. P.; 31 L. T. Rep. 117.

⁵ 5 M. & W. 535.

pretation of the contract as a matter of law from the judge. Accordingly in libel it is for the judge to say whether words in ordinary use have a defamatory meaning; but for the jury to say whether words of a cant or slang character have acquired such a meaning.¹ Thus the court have directed juries, that the words "as soon as possible," in a contract, mean without unreasonable delay according to the circumstances:² that "forthwith" has a similar meaning:³ but the signification of words, according to the custom of particular trades, such as "bales," is for a jury.⁴ Under this rule also is contained the general principle that whenever facts have to be proved by oral evidence or extrinsic circumstances the jury pronounce the inference; but when the evidence assumes a written form this function belongs to the judge. Thus when the question is whether a contract has been executed as an escrow, or not, if the question depend on facts the jury decides: if on the construction of writings it belongs to the judge.⁵ But when secondary oral evidence of writings is admitted it has been settled lately that the judge and not the jury construes the evidence, because the issue is substantially one on the construction of a writing.⁶

This rule does not apply in cases of actionable or indictable tort, where guilt or innocence is to be inferred from the contents and meaning of a writing. Thus, on an indictment for writing a menacing letter, the jury will say whether the language amounts to a menace.⁷ In libel, the question of libel or not libel is entirely for the jury in civil cases, it would appear, as well as criminal cases, and the judge may only give a general definition of the offence.⁸ But if the jury

¹ *Barnett v. Allen*, 27 L. J. 412, Ex.

² *Attwood v. Emery*, 26 L. J. 73, C. P.

³ *Roberts v. Brett*, 25 L. J. 280, C. P.

⁴ *Gorrissen v. Perrin*, 27 L. J. 29, C. P.

⁵ *Furness v. Meek*, 27 L. J. 34, Ex.

⁶ *Berwick v. Horsfall*, 27 L. J. 193, C. P.; 31 L. T. Rep. 117.

⁷ *R. v. Girdwood*, 2 East P. C. 1120.

⁸ Sup. p. 10.

find against the defendant, the court will arrest the judgment, if the writing, on the face of it, appear not to be libellous.¹

Finally, it is for the jury, apparently, to determine the meaning of foreign law and documents, on the testimony of skilled witnesses; but for the court to decide on the competency of the witnesses, the admissibility of documents, and the applicability of the foreign law to the matter in issue.²

¹ *Hearne v. Stowell*, 12 A. & E. 719; *Goldstein v. Foss*, 6 B. & C. 154.

² Tayl. § 40; *R. v. Picton*, 30 How. St. Tr. 536 to 540, 864 to 870.

CHAPTER III.

ON BILLS OF EXCEPTIONS, NEW TRIALS, AND DEMURRERS
TO EVIDENCE—ON THE COMPETENCY OF WITNESSES.

WHERE either party to an action considers that the judge has wrongly admitted or rejected evidence at the trial, he may appeal from the ruling by a bill of exceptions, or by motion for a new trial.

The former right is a statutory privilege which was given by the 13 Edw. 1, c. 31. It is there enacted that "if one impleaded before any of the justices, allege an exception, praying that the justices will allow it ; if they will not, and if he write an exception and require the justices to put their seals to it, the justices shall do so, and if one will not another shall."

It has always been doubted whether this right extends to criminal proceedings ; and the weight of authority is in the negative. At Sir H. Vane's trial for high treason the court would not grant a bill of exceptions, "because criminal cases were not within the statute, but only actions between party and party."¹ "Whether a bill lies or not in any criminal case is a point not settled."² And in the recent case of *The Attorney-General v. Radloff*, it seems to have been held that an information for penalties is a criminal proceeding on which a bill of exceptions will not lie, even with the consent of the Attorney-General.³ But when a verdict is against evidence, a new trial may be granted on an indictment in the nature of a civil proceeding, as for obstructing a navigable strait.⁴

The exception must be taken at the trial, and before

¹ 1 Lev. 68. ² Per Lord Hardwicke, *R. v. Preston*, Rep. temp. Hard. 251. ³ 23 L. J. 240, Ex. ⁴ *R. v. Russell*, 23 L. J. 173, M. C.

verdict.¹ It must state the alleged misdirection ; and be tendered to the judge, who will seal it. After it is sealed it may be amended.² If the court above be of opinion that the evidence was improperly received or rejected, they will grant a new trial.³ The same matter cannot be raised by bill of exceptions and also by a motion for a new trial; but if there are independent questions, and one of them may, but the other cannot be raised by bill of exceptions, a party is not precluded from moving as to the latter, because a bill of exceptions has been tendered with respect to the former.⁴

To entitle a person to a new trial on the ground of the rejection of evidence, it must appear not merely that it was offered and not received, but that the judge was given to understand that its reception was pressed, and that he deliberately rejected it.⁵

If a judge misstates evidence in summing-up, a new trial will be granted if the misstatement was pointed out to the judge at the time, but not otherwise.⁶ So it is ground for a new trial if he omit to call the attention of the jury to material circumstances.⁷ A new trial will also be granted if a jury misconduct themselves,⁸ or if the judge be dissatisfied with their verdict ; and in civil proceedings the courts exercise a general discretion of granting new trials where the verdict appears to have been against the weight of evidence. But no new trial is ever granted in cases of indictable felonies and crimes ; nor as a general rule in misdemeanors, although in a few instances it has been granted in the latter cases.⁹

When facts are established, but it is disputed how far they maintain an issue, it was formerly a practice to demur to the evidence. By this course all facts are

¹ *Wright v. Sharpe*, 1 Salk. 288

² *Cully v. Doe d. Taylerson*, 11 Ad. & El. 1008.

³ *De Rutzen v. Lloyd*, 5 A. & E 457.

⁴ *Marquis of Salisbury v. Gladstone*, 7 W. R. 408.

⁵ *Whitehouse v. Hemmant*, 27 L. J. 295, Ex.

⁶ *Payne v. Ibbotson*, 27 L. J. 341, Ex.

⁷ *Hemming v. Garson*, 31 L. T. 176.

⁸ *Allum v. Boulbee*, 23 L. J. 208, Ex. ⁹ 2 Phill. 548. Sup. p. 19.

admitted, and the issue reduced to one of law. But as the same object can be obtained by taking a special verdict, or a verdict subject to a special case, and as these are more customary expedients, we need not enlarge here on a topic which belongs more strictly to treatises on the practice of courts.

We are now to consider the competency of witnesses.

It has been already stated,¹ that all objections to the competency of witnesses are for the decision of the judge, who will, if there appear to be any doubt on the subject, examine the witness before allowing him to be sworn. This preliminary examination is termed the examination on the voir dire, *i. e.* vrai dire. Under this title it may be considered to be the general and established principle of evidence, that—

All persons of sound and adult mind, believing in the religious obligation of an oath, and including generally, but not universally, the parties to civil proceedings, but not a prisoner or defendant on a criminal charge, are competent and compellable witnesses in every court of justice concerning the matters in issue.

Under this rule the first consideration will be—

SECT. 1. *On Incompetency from Defect of Understanding in Witnesses.*

Persons who have not the use of reason are, from their infirmity, utterly incapable of giving evidence, and are therefore excluded as incompetent witnesses.²

This description of incompetency may be either constitutional or accidental : and in the latter case it may be either temporary or permanent. It may also

¹ Sup. p. 9.

² 1 Phill. 7.

arise from imperfect development. Hence we have three classes of incompetent witnesses :—

1. *Idiots.*
2. *Lunatics.*
3. *Children.*

1. An idiot is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any;¹ and such a person is incapable of giving evidence. But deaf and dumb persons, if they are of sufficient understanding, and know the nature of an oath, may give evidence either by signs, or through an interpreter, or in writing.² But it is stated by Mr. Phillipps,³ on the authority of Blackstone, that a man who is born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot, and is therefore an incompetent witness. This position appears to be very disputable. It is stated in a work of high authority,⁴ that the presumption that a person born deaf, dumb, and blind from his nativity is an idiot, is only a legal presumption, and is therefore open to be rebutted by evidence of capacity. This would seem to be the more correct doctrine ; and there can be little doubt that in such a case as that of the well-known Laura Bridgman, who has been deaf, dumb, and blind from her birth, and is yet endowed with a high degree of intelligence, which she communicates by signs, no objection of incompetency could be supported.

2. A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason.⁵

As long as the suspension of the intelligence continues, the lunatic is an incompetent witness: but there

¹ Bl. Comm. 303.

² 1 Hale P. C. 34 ; *Rushton's case*, 1 Leach C. C. 455 ; *Morrison v. Lennard*, 3 Car. & P. 127.

³ 1 Phill. 7.

⁴ Chitty's Med. Jur. 1. 301 ; *contra*, 1 Bl. Comm. 304.

⁵ 1 Bl. Comm. 304.

appears to be no doubt that his competency is restored during a lucid interval.¹ Nor will the disability extend to cases of mere monomania, nor where the hallucination permits the witness to understand the nature of the duty which is expected from him.

3. There is no epoch of legal discretion under which an infant is an incompetent witness. The rule that an infant under seven years of age cannot commit a felony, because the law presumes him conclusively not to have sufficient intelligence for the act, is not applicable to the law of evidence. Age is immaterial; and the question is entirely one of intelligence, which, whenever a doubt arises, the judge will ascertain to his own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury. But although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial with a view to qualify him.² But a judge may, in his discretion, postpone a trial, in order that the witness may be instructed in the nature of an oath. The inclination of judges, however, is against this privilege.³

SECT. 2. *On Incompetency from Defect of Religious Principle.*

The principle on this head is, that—

No person is a competent witness unless he believes in a Supreme Being who will punish him, either in the present or a future life, for perjury.

It has been the established principle, until very

¹ Com. Dig. Testim. (A. 1.) ; s. v. Tayl. Med. Jur. 783.

² Per Patteson, J. ; *R. v. R. Williams*, 7 C. & P. 320.

³ 1 Lea, 430 u. ; *R. v. Nicholas*, 2 C. & K. 246.

recently, of English law, that no witnesses are to be believed unless they deliver their evidence on oath. The only exceptions to this rule were statutory, and were granted reluctantly by the Legislature to satisfy the conscientious scruples of Quakers, Moravians, and Separatists ; and members of these sects were accordingly allowed to give evidence on affirmation instead of oath. This principle has now been extended. By 17 & 18 Vict. c. 125, s. 20, it is enacted—

“If any person, called as a witness, or required to make an affidavit or deposition, shall refuse or be unwilling, from *alleged conscientious* motives, to be sworn, it shall be lawful for the court, or judge (or other presiding officer, or person qualified to take affidavits or depositions), *upon being satisfied* of the *sincerity* of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz. :—

“‘I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, not lawful; and I do also solemnly and truly affirm and declare,’ &c., which solemn declaration shall be of the same force and effect as if such person had taken an oath in the usual form.”¹

And by the 89th section of the same act:—

“Any person who shall, upon any examination upon oath or affirmation, or in any affidavit in the proceedings under this act, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury.”

Before the passing of this act, when a witness, who

¹ cf. 20 & 21 Vict. c. 77, s. 27 (Act to Amend the Law of Probate).

did not belong to any one of the exempted sects, objected, on alleged conscientious grounds, to be sworn, the judge was bound, notwithstanding, to order an oath to be administered to the witness; and, in the event of continued contumacy, would direct him to be committed. This course was adopted by Wightman, J., at the summer assizes for Devonshire, 1854.¹ A lady, who described herself as a member of the society of Plymouth Brethren, refused, from alleged conscientious motives, to be sworn as a witness; and the judge, after commenting severely on the obstructions to public justice that must arise if such scruples were tolerated, committed her to prison during the term of the assizes.

It will be seen that the theory of this practice has been much shaken by the recent act; but it is apprehended that it will still be maintained whenever the judge distrusts the sincerity of the alleged conscientious objections of a witness. It will, therefore, be by no means a matter of course for the judge to dispense with the solemnity of an oath; but the privilege will probably be allowed only in rare cases, and after a searching scrutiny into the nature of the witness's scruples. There is no doubt that the law on this point, previously to the late act, was anomalous and unreasonable; but, unless the new law be limited in its operation by judicial precaution, it may be presumed that, notwithstanding the extended penalties of perjury, the credibility of evidence will be lessened infinitely in numberless cases by the increased facilities of subterfuge which are extended to Jesuitical casuistry.

An oath, or an affirmation, when it is allowed, is regarded as an indispensable condition precedent to the admissibility of a witness, on the Common Law doctrine, that a mere statement of a fact is entitled to no credit. For even the admissibility of affirmations by the existing law rests on principles which are widely different from those of a simple narrative.

¹ MS.

Virtually, the new law is the same as the old; and the diversity is one of terms rather than of essence. The same basis of religious belief, and the same temporal penalties are, in both cases, the conditions and safeguards of competency and credibility. The new principle is identical with the old, because it is applicable only to witnesses who succeed in convincing the judge that they believe simple falsehood to be as sinful and criminal an act as perjury.

The Common Law doctrine on this head is contained in the well-known case *Omichund v. Barker*.¹ The question there arose on the admissibility in evidence of some depositions which had been made on oath by some Gentoos before a Chancery Commission in the East Indies. It had been thought, up to that time, on the authority of Coke,² that none but Christians were competent witnesses. He had laid it down that "an infidel cannot be a witness;" and it was clear that, under the designation of infidel, he classified all who were not Christians. *Omichund v. Barker* exploded and liberalized the previous doctrine. Willes, C. J., undertook to show that Lord Coke's proposition was "without foundation, either in Scripture, reason, or law;" and gave it as his opinion, which may be regarded as the existing law, that—

"Such infidels who believe in God, and that he will punish them if they swear falsely [in some cases and under some circumstances], may and ought to be admitted as witnesses in this, though a Christian country."

And,—

"Such infidels, if any such there be, who either do

¹ Willes, 538 ; 1 Sm. L. C. 194.

² Co. Litt. 6. b.

[EV.]

not believe in God, or if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason, because an oath cannot possibly be any tie or obligation upon them."

The above words of the Chief Justice's judgment, which are placed in brackets, are so placed, because the limitation which they seem to imply is not conceived to be law at the present day. It is conceived that that law is embodied in the principle as stated above;¹ and that the witness is incompetent, unless he believes in a God who will *certainly* punish him, either in this life or another, for perjury in the particular case in which he is sworn to tell the whole truth.²

The mode of administering an oath has been regulated by the 1 & 2 Vict. c. 105. It is there enacted—

"That in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any Court of Law or Equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

The recent statute (17 & 18 Vict. c. 125), would

¹ Sup. p. 22.

² See note to *Omichund v. Barker*, 1 Sm. L. C. sup.

appear to leave the statutory exemptions of Quakers, Moravians, and Separatists as they were before. All members of these sects, and all who have been members of the two former sects, may claim, *as of right*, to give their evidence on affirmation.¹ In all other cases the judge will, in his discretion, concede or refuse a witness the privilege of substituting an affirmation for an oath.

SECT. 3. *On the Competency and Incompetency of Parties to Civil Proceedings.*

It is no objection to the competency of a witness that he is of infamous character; or that he is a party to the record, or otherwise interested in the result of the issue. Only parties to proceedings in consequence of adultery and actions for breach of promise of marriage cannot be witnesses in such proceedings.

Formerly, a witness might be objected to as being of infamous character, or a party *interested* in the result of the issue. But this principle was abolished by the 6 & 7 Vict. c. 85, usually called Lord Denman's Act. This statute recites that—

“The inquiry after truth in courts of justice is often obstructed by incapacities created by the present law ; and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are to decide upon them, and that such persons should exercise their judgment on the *credit* of the witnesses adduced for the truth of the testimony.”

It then enacts that—

“No person offered as a witness shall hereafter be

¹ 3 & 4 Will. 4, c. 49 ; 3 & 4 Will. 4, c. 82 ; 1 & 2 Vict. c. 77 ; *Doran's case*, 2 Moo. C. C. 37.

excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or party having, by law or consent of parties, authority to hear, receive, and examine evidence ; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, in those cases where affirmation is by law receivable, notwithstanding that such party may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

This act includes certain exceptions to the new law, most of which have ceased to operate.

This act was followed by the 14 & 15 Vict. c. 99 (the Law of Evidence Amendment Act.) Lord Denman's Act had left actual parties to the record incompetent witnesses. This disability was now removed ; and it was enacted that—

Sect. 2. " On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties, authority to hear, receive, and examine evidence, the *parties* thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be *competent* and *compellable* to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 4. "Nothing herein contained shall apply to any action, suit, or proceeding, or bill, in any Court of Common Law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of

Adultery,
or to any action for
Breach of promise of marriage."

It follows that no person is incompetent, in a civil cause, to become a witness on the ground that he is a party to the record unless he be either a plaintiff or defendant in an action for a breach of promise of marriage; or unless the proceeding, to which he is a party, have been instituted in consequence of adultery. But the latter provision is now modified; for the action for criminal conversation has been abolished by the new Divorce Act (20 & 21 Vict. c. 85, s. 59); and by sect. 43 a petitioner may be examined by order of the court, but is not compellable to answer questions which tend to show that he or she has committed adultery. But respondents and co-respondents are not compellable nor competent witnesses;¹ but the court has statutory power to dismiss a co-respondent from the suit, in which case he becomes a competent witness.² It may be noticed here, with reference to a wife's competency as a witness against her husband, that, though generally competent under 16 & 17 Vict. c. 83, she is excepted by that act from being so in cases of adultery;³ and even when a dissolution is sought on the ground of adultery and desertion by the husband, she cannot be called to prove the desertion.⁴ But this doctrine does not apply to cases where a judicial separation is sought on the ground of cruelty or desertion without adultery.

¹ *Robinson v. Lane*, 27 L. J. 91, P. & M.

² 21 & 22 Vict. c. 108, s. 11.

³ Inf. p. 39.

⁴ *Pym v. Pym*, 27 L. J. 54, P. & M.

SECT. 4. *On the Incompetency of Parties to Criminal Proceedings.*

The 14 & 15 Vict. c. 99, s. 3, enacts that—

Sect. 3. “Nothing herein contained shall render

Any person who in any criminal proceeding is charged with the commission of any indictable offence :—or

Any offence punishable on summary conviction :—competent or compellable to give evidence for or against himself or herself ;—or

Shall render any person compellable to answer any question tending to criminate himself or herself ;—or

Shall in any *criminal* proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.”

It has long been held that a prosecutor, in a criminal proceeding, is a competent witness against a prisoner ; and although there were formerly exceptions to the rule, they have all been removed by Lord Denman’s Act, and other statutes.¹

The same act (6 & 7 Vict. c. 85), by rendering all persons competent as witnesses notwithstanding they may have an interest in the matter in question, or the event of the trial, has removed all doubt as to the admissibility of informers and accomplices as witnesses. All such persons are competent witnesses ; but the objections to their credibility remain as before ; and it is understood to be a settled principle, that—

A prisoner ought not to be convicted upon the evidence of any number of accomplices if unconfirmed or uncorroborated by other testimony.²

¹ *R. v. Boston*, 4 East, 581 ; *Gilb. Ev.* 123 ; *Archbold’s Cr. Pr.* by Welsby, 12th ed. 225.

² *R. v. Noakes*, 5 C & P. 236.

The reasonableness of this rule is obvious from the suspiciousness which is inseparable from this kind of evidence. The Legislature has held that this quality is not sufficient of itself to justify them in excluding such evidence from a jury; or in laying down any principle by which it shall be denied all the elements of credibility. It may be tendered from motives of conscientious penitence; but ordinary experience, and knowledge of human nature, must convince every one that it is still more likely to be tendered from motives of interested treachery or revenge; and in every such case the amount of credibility sinks to a minimum. When the purity and solemnity of an oath have been tarnished by the mere contingency of such influences, they cannot be restored to their primal sanctity by any quantity of direct personal asseveration. Such evidence must always come before a jury, exposed to and attenuated by irresistible sentiments of distrust.

It is therefore held that the evidence of accomplices ought not merely to be corroborated, and that in the absence of corroboration a prisoner ought to be acquitted, but that the corroboration of an accomplice's evidence ought to go to the *identity* of the prisoner : *i. e.*, it should satisfy a jury that the prisoner is *the person* who committed the crime with which he is charged by the accomplice. This doctrine is illustrated in the case of *Reg. v. Foster*.¹

There the prisoner was indicted for night-poaching; and the only evidence was that of an accomplice who swore to the fact of the prisoner being one of a party ; but the only confirmation of the statement was, that on the same evening the witness and the prisoner had been seen drinking together at a public-house which was within one hundred and fifty yards of the prisoner's house, and four miles from the preserve. It was also proved that the prisoner frequented the house ; and that he and the accomplice left the house together when the house was closed.

¹ 8 C. & P. 107.

Upon the opening of the case Lord Abinger, C. B., said :

“ I am clearly and decidedly of opinion, and always have been, that there must be a corroboration as to the particular prisoner.” . . . And in summing up :—
“ I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner’s guilt, but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, the corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime will always be able to relate the facts of the case ; and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat and steal your property, it would be no corroboration that he had stated all the facts correctly : that he had described how the person did put the knife to the throat and did steal the property : *it would not at all tend to show that the person accused participated in it.* Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there ; and he left when they were shutting up the house. It is perfectly natural that he should have been there and have left when he did. *The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week : there the case ends against him ; all the rest depends on*

the evidence of the accomplice. The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The prisoner was acquitted.

It is still, however, *competent* to a jury to convict on the uncorroborated evidence of an accomplice.¹ And it is only a rule of practice, and not of law, for a judge to tell a jury that they ought not to convict on the uncorroborated evidence of an accomplice.² In *R. v. Jones*,³ Lord Ellenborough said:—

"No one can seriously doubt that a conviction is strictly legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed; but if he is believed his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation for another witness." He referred also to a case where *four* men were convicted on evidence of an accomplice who was confirmed only as to his evidence against *three* of the prisoners.

On an indictment for receiving stolen goods the principal thief is a competent witness.⁴ And where several are indicted, the prosecutor may, by leave of the court, take a verdict of acquittal as to one or more, and call them as witnesses against the remaining prisoners.⁵ It appears also that an accomplice, who is himself charged on a separate indictment, is a competent witness for a prisoner;⁶ and a prisoner who has pleaded guilty, may be called, before sentence, for or

¹ *R. v. Hastings*, 7 C. & P. 152.

² *R. v. Stubbs*, 25 L. J. 16, M. C.

³ 2 Camp. 133.

⁴ *R. v. Patram*, 2 East P. C. 782.

⁵ *R. v. Owen*, 9 C. & P. 83.

⁶ 2 Hale P. C. 280.

against his co-defendants.¹ And where the evidence against one of several prisoners is slight, the judge will direct an acquittal in order to enable the others to call him as a witness.² In connection with this subject may be noticed the fixed principle that generally, but with exceptions of which a principal one has been just stated, a jury is quite justified, if it think proper, in finding a verdict on the uncorroborated statement of a single witness; or on the unaided testimony of any documentary evidence however slight, provided it be admissible. Even where the only evidence consists of the directly opposite statements of adverse witnesses the jury may believe which they like. But in charges of treason no person can be convicted but upon the oaths and testimony of two lawful witnesses, either both to the same overt act or one to one, and the other to another overt act of the same treason, unless the accused shall willingly and without violence in open court confess the same; and if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.³ So in order to convict a defendant of perjury it is necessary that there should be two witnesses to prove the falsehood; "for this reason, that if there be the oath of one person only against that of the defendant, it may be considered doubtful which of the two is true; but it is never necessary that there should be two independent witnesses to contradict the defendant on any one particular point, and it is sufficient that there should be two pieces of evidence, proved by separate witnesses, in direct contradiction to the statement of the accused on which the perjury is alleged."⁴ Thus also in cases of bastardy an affiliation order on a putative father cannot be

¹ *Reg. v. George*, Car. & M. 111; *Reg. v. Hincks*, 1 Den. C. C. 84.

² Wels. Cr. Pr. 227.

³ 7 Will. 3, c. 3, ss. 2, 4.

⁴ Wightman, J.: *R. v. Hook*, 8 Cox Crim. Cas. 5; 27 L. J. 224, M. C.

made on the uncorroborated statement of the mother; and the order will be bad unless it states that it was made on evidence corroborating the mother's statement in *some material particular*.¹

We have now to consider the effect of the early part of the 3rd section of the 14 & 15 Vict. c. 99.²

At Common Law, a defendant in a criminal charge, so far from being bound or competent to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a magistrate.³ The statute confirms this state of the law; but the words of the act must be understood with some limitations. It will be observed that they are, that—“Nothing herein contained shall render any person who in any criminal proceeding is charged, &c. . . . *competent* or compellable to give evidence *for* or *against* himself.”

It might be inferred from this clause that a defendant in a criminal proceeding cannot, in any case, be convicted on his own evidence. But this is not the construction which has been put on this part of the act, although it might perhaps be contended that, according to the letter, the Common Law principle that no man is *bound* to criminate or betray himself (*nemo tenetur seipsum prodere*) is enlarged to the extent of an absolute and universal prohibition. The point, as far as the present writer is aware, has never been raised; but the practice remains as before the act; and prisoners are daily, not merely suffered to plead guilty on arraignment, and so become convicted in the eye of the law on their own evidence, but their statements before magistrates, after the statutory caution of the 11 & 12 Vict. c. 42, s. 18, and their subsequent confessions, are always received as evidence on which alone a jury may convict. It was, doubtless, the sole intention of the clause to introduce no new

¹ 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10; *R. v. Buckinghamshire*, 14 L. J. 45, M. C.; *R. v. Berry*, 28 L. J. 86, M. C.

² Sup. p. 30.

³ Wels. Cr. Pr. 226.

voluntary or compulsory facilities by which prisoners might convict themselves; but this intention appears to be at variance with the language; and the obscurity is increased by the employment of the same words in the same section, in defining the incompetency of husbands and wives to give evidence for or against each other in any criminal proceeding. In this latter case it is clear, according to the 16 & 17 Vict. c. 83, that the incompetency is unqualified; but in the former case it must be understood according to the above limitations; and, subject to them, it may be laid down that in all indictable crimes, or offences punishable on summary conviction, the prisoner or defendant cannot be compelled, nor is he even competent, to give oral evidence on oath for or against himself. But he still has his right of stating his case before the committing magistrate, or to a jury.

Several questions have arisen on this part of the same section as to what is a criminal proceeding, and what is a civil proceeding. In the *Attorney-General v. Radloff*,¹ which was an information for penalties under the Smuggling Act, 8 & 9 Vict. c. 87, the defendant offered himself as a witness, and the court was divided as to his competency.

It was held by Pollock, C. B., and Parke, B., that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction; but Platt, B., and Martin, B., held it to be not of a criminal nature, and that the defendant was a competent witness. The view of Platt, B., appears to contain the true solution of all such difficulties:—"What is a civil proceeding as contradistinguished from a criminal proceeding? It strikes me that the true test is to see if the subject-matter be of a personal character; that is, if the proceeding relates to goods or property which it is sought to recover by legal proceedings, that is a *civil* proceeding; but if it is one which may at once affect the defendant personally by the imprisonment of

¹ 23 L. J. 241, Exch.

his body in the event of a verdict of guilty being pronounced against him as a public offender, that is what I consider a *criminal* proceeding. . . . Now, although informations of this kind by the Attorney-General may by some be considered criminal proceedings, I rather deem them in the nature of civil proceedings, and like the old actions to recover penalties under the Game Laws, which we all remember were civil proceedings. . . . Here the object is to recover money—to recover that which, by the law, is made a debt.” Similar doubts have been raised in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but Erle, J., has held him to be competent, on the ground that the proceedings on an affiliation order are of a civil, and not of a criminal, nature.¹ This view is confirmed by the language of Lord Campbell, C. J., in a very recent case.² That was a proceeding against the defendant for a breach of the Game Laws, viz., for using snares for game without having a certificate. The information was under 1 & 2 Will. 4, c. 32, by which, on conviction, the defendant is liable to a fine, and in default of payment to be imprisoned and *kept to hard labour*. The judges held unanimously that the defendant was not a competent witness in such a proceeding; and they relied, as it seems, chiefly on the fact that the prisoner was liable to hard labour in default of payment of the fine, to show that the proceeding was of a criminal, and not of a civil, character. It is also plain that the inclination of the court in this case was, to hold all proceedings to be of a criminal nature, when the judgment assumes the form of a fine, which may be enforced by imprisonment. The test, according to Lord Campbell, in such cases seems to be to consider whether it is sought to recover a sum of money in the nature of a debt from a person, as in

¹ *Ex parte Crowley*, 24 L. T. 244.

² *Cattell v. Ireson*, 27 L. J. 167, M. C.

bastardy cases ; or to inflict punishment of an exemplary and public nature. In the former case the defendant is competent ; in the latter he is incompetent, as a witness.

The privilege of witnesses to refuse to answer questions which tend to criminate them will be discussed subsequently.¹

SECT. 5. *On the Incompetency of Husbands and Wives as Witnesses for or against each other.*

The concluding words of the 3rd section of the 14 & 15 Vict. c. 99, declare that nothing contained in the act—

“ Shall in any *criminal* proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.”

The first question which arose on the construction of this clause was as to the competency and compellability of husbands and wives to give evidence for or against each other in civil proceedings. It was held, in two cases, that they were severally incompetent ;² but it appeared that it was the intention of the Legislature to make them competent. And now, by the 16 & 17 Vict. c. 83, husbands and wives are rendered competent and compellable, in all *civil* cases, to give evidence “ on behalf of any or either of the parties to the said suit, action or proceeding ; ” but this provision does not extend to criminal cases, nor to cases of adultery (s. 2) ; and neither husband or wife is competent or compellable to disclose any *communi-*

¹ Inf. part 3.

² *Barbat v. Allen*, 21 L. J. 155, Ex. ; *Stapleton v. Crofts*, *ibid.* Q. B. 247.

cation made to him or her by the other during marriage (s. 3).

Previously to the 14 & 15 Vict. c. 99, husbands and wives had been rendered competent and compellable to give evidence for and against each other in the new County Courts, under the 9 & 10 Vict. c. 95, s. 83. The exceptions, therefore, to the existing rule of their competency are to be sought only in criminal cases, and cases of adultery.¹ In criminal cases the general rule has always been that husbands and wives are not competent to give evidence for or against each other.² Nor can a wife or husband be a witness for or against any person who is indicted jointly with the husband or wife ;³ nor, on an indictment for a conspiracy, can the wife of one of the conspirators give evidence in favour of the others ; because their acquittal must enure to the benefit of the husband.⁴ But in high treason it has been doubted whether a wife may not be made a witness against her husband.⁵ And in all cases where the husband is indicted for a personal injury to the wife, or the wife for a personal injury to her husband, the injured party is a competent witness against the other.⁶ The dying declarations of a wife who has been murdered by her husband, if not otherwise inadmissible, are evidence against him.⁷

It has also been held that, *propter bonos mores*, neither husband nor wife is competent to prove non access, in order to bastardize the issue ; but it may be doubted whether this rule can be upheld since the late act.

The general principles by which the competency

¹ Sup. p. 29.

² Co. Litt. 6, b.

³ *R. v. Smith*, 1 Mood. C. C. 289.

⁴ *R. v. Locker*, 5 Esp. 107.

⁵ *R. v. Griggs*, T. Raym. 2.

⁶ *R. v. Audley*, 1 St. Tr. 393 ; *R. v. Ayze*, 1 Str. 635.

⁷ *R. v. John*, 1 East P. C. 357.

and incompetency of witnesses are tested, have now been stated. And although in doing so it has been unavoidable to anticipate some of the excluding principles of evidence, which will be discussed more fully in a subsequent part of the work, we may now proceed to consider the fundamental rules by which evidence must be received or rejected.

CHAPTER IV.

ON THE RULE THAT THE BEST EVIDENCE MUST BE GIVEN; ON PRIMARY AND SECONDARY EVIDENCE.

It is an inflexible rule, that—

The best evidence must be given.¹

This rule is also stated thus:—

The law requires the best evidence of which the nature of the thing is capable.

The principle of this rule rests on the presumption that if inferior evidence is offered, when evidence of a better and more original nature is attainable, the substitution of the former for the latter arises either from fraud, or from gross negligence, which is tantamount to fraud. Thus, if a copy of a deed or will be tendered, while the originals exist and are producible, it is reasonable to assume that the person who might have produced the original, but who omits to produce it, has some private and interested motive for tendering a copy in its place. Here the deed or will are the *best* and *primary* evidence. The copy is *secondary*, and however indisputably it may be authenticated, it is inadmissible in evidence as long as the original can be produced.

It is sometimes difficult to determine what is primary

¹ B. N. P. 293; 1 Phill. 430, 431, and note to *Kostor v. Reed*, 6 B. & C. 21.

and what is secondary evidence; and where both oral and written proofs of a fact are producible, the character of the fact must be investigated in order to ascertain which species of evidence is the *best*. The questions to be asked for this purpose are, which species is most *original* in its nature, and which is most likely to convey accurate information as to the matter in dispute. According to its proximity to, or remoteness from, the highest sources of moral certainty, evidence will be either primary or secondary.

Thus, it is a rule that when a contract has been reduced to writing, the writing, as long as it exists, is the best and only evidence of the terms of the contract. Oral evidence is admissible to explain but not to contradict it. But if the writing be destroyed; or if it cannot be found after diligent search; or if an adverse party, in whose hands it is, refuse to produce it, after having received due notice; then it is considered fair and reasonable, that any competent witness who is acquainted with the terms of the contract, should be allowed to give oral evidence of it.

On the other hand, if a prisoner has been committed for trial on the oral depositions of witnesses, it would be manifestly unfair to admit their depositions, even when reduced to writing and certified by the committing magistrate, to be given in evidence against the prisoner, as long as the original witnesses can be produced before a jury, confronted with the prisoner, and subjected to the cross-examination of the latter, or his counsel. It is therefore a Common Law principle that such depositions are secondary evidence which is admissible only in certain cases where the original deponents cannot be produced. This subject will be more fully discussed in a later chapter.

But there may be *distinct* sources of evidence, one of which may be oral, and another contained in writing. In such a case both will be primary, and therefore either will be admissible. Thus, a written receipt is *primâ facie* evidence of payment; but it is not the only evidence, because a written acknowledgment by

a creditor that he has been paid, is not necessarily better evidence than the oral evidence of a debtor who swears that he has paid the money. Accordingly the payment may be proved either by producing the creditor's receipt and proving his signature, or by the oral deposition of the debtor.

In *The King v. Kingston-upon-Hull*,¹ to prove a subsequent settlement, the pauper was asked whether he had not occupied and paid rent for a tenement. The opposite counsel interposed, and asked if he had held under a written contract. It appeared that he had, and it was then submitted that the writing must be produced, and that the original question could not be answered. But the court held that it might. Bayley, J., said:—"The general rule is, that the contents of a written instrument cannot be proved without producing it. But although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol without proving the terms of it." And Littledale, J.:

"Payment of rent as rent is evidence of tenancy, and may be proved without producing the written instrument."²

But this class of exceptions to the general rule can be maintained only where the fact, of which oral evidence is admitted, is something extrinsic and collateral to the written contract.³ If it be in any degree of the essence and substance of the contract, then the writing must be produced; *e. g.*, in a question of title,⁴ or where the terms of the tenancy are material.⁵ But the fact of the existence of a writing or of its execution may be proved without producing the writing; but not any of its contents.⁶ In the

¹ 7 B. & C. 642.

² See also *Twyman v. Knowles*, 22 L. J. 143, C. P.

³ *R. v. Castle Morton*, 3 B. & Ald. 590.

⁴ *Cotterill v. Hobby*, 4 B. & C. 465.

⁵ *R. v. Merthyr Tydvil*, 1 B. & Ad. 31.

⁶ *Darby v. Ouseley*, 25 L. J. 227, Ex.

recent case of *Yorke v. Smith*,¹ where a bill of sale was inadmissible for want of a stamp, it was held that oral evidence of the fact that there had been a sale was wrongly admitted. But if a contract be established by oral evidence, it is for the adverse party to prove that it was in writing. In *R. v. Inhabitants of Rawdon*,² Bayley, J., said :

“There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a *primâ facie* case of tenancy, and that it then lies on the opposite party to rebut the *primâ facie* case so made out.”

In an action to recover a written document oral evidence of its contents may be given, without previous notice to produce it.³ But where a prisoner was indicted for arson with intent to defraud a fire office, it was held that secondary evidence of the policy was inadmissible, as due notice had not been given to produce it.⁴

The subject of Secondary Evidence will be again investigated when we treat of the mode of proving written instruments.⁵

Where a writing is inadmissible as primary evidence, either because it purports to be a statement of a witness who may be called, or for want of a stamp, it may be handed to the writer for the purpose of refreshing his memory, and so practically be made evidence. The fiction of law in this case is that the witness, although he may not have the least recollection of the written facts, renews his remembrance of them by means of his own memoranda;⁶ or that, at all events, the sight of his written statements recalls the conviction which he had of their accuracy at the time

¹ 21 L. J. 53, Q. B.

² 8 B. & C. 710.

³ *Jolly v. Taylor*, 1 Camp. 148.

⁴ *R. v. Kitson*, 23 L. J. 118, M. C.

⁵ *Infra*, pt. 2, c. 5.

⁶ *Ibid.*

when they were made. But in this instance it will be observed that the principle that the best evidence must be given is maintained, at least in theory. The writing is inadmissible in its actual form; but it is received in a new character as the oral deposition of a sworn witness. In *Maugham v. Hubbard and Another*,¹ to prove payment, a cash-book, containing an unstamped acknowledgment, was put into the hand of the writer, who said:—"The entry has my initial; I have no recollection that I received the money; I know nothing but by the book; but, seeing my initials, I have no doubt that I received the money." Lord Tenterden, C. J., said:—"Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money, there was *sufficient* parol evidence to prove the payment."

Fraud is the foundation of the rule by which the best evidence is required; and secondary evidence is received whenever its substitution for primary evidence does not create a reasonable presumption of fraud. Thus it seems that the substance of old records may be proved by a witness who has examined them.² Inscriptions on tomb-stones, escutcheons, and walls, may be proved by witnesses and examined copies.³ But Dugdale's *Monasticon Anglicanum* was rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were producible.⁴

It is held that the rule relates not to the measure and *quantity* of evidence, but to the *quality*.⁵ It is

¹ 8 B. & C. 14.

² *Rowe v. Brenton*, 3 M. & R. 312.

³ *Mortimer v. M'Callum*, 6 M. & W. 68.

⁴ Salk. 281.

⁵ Stark. 643.

not necessary to give the fullest proof of which a fact may admit. Thus, in the cases where there are several attesting witnesses, it is sufficient to call one only where one only is required by law to the validity of the instrument; or, in the event of the death of all the witnesses, it is sufficient to prove the handwriting of any one.¹

¹ Stark. 504 and 519; 17 & 18 Vict. c. 125, s. 26.

CHAPTER V.

ON PRESUMPTIVE EVIDENCE.

EVIDENCE is said to be Presumptive or Circumstantial as distinguished from Direct Evidence, when an inference as to a disputed fact is drawn from the proof or assumption of a collateral fact. It is true that the judgment acts even in the case of Direct Evidence; and the testimony, which purports to be derived immediately from the senses, comes to the witness originally distorted by their imperfections, and under the manifold and insuperable influences of infirmity and misapprehension. Under these circumstances the judgment supervenes to rectify and systematize the confused impressions of the senses; but it is impossible, even to their subject, to state where perception ends and judgment begins. Distance and space appear to be intuitions of the perception; but the most superficial investigation proves them to be logical deductions of the reason.¹ If the senses could act without the intervention and assistance of the judgment, external objects might still be painted on the retina of the eye; and possibly be communicated to, and retained in, the memory of the recipient; but, unless the reasoning faculty interposed to distinguish, to arrange, and to methodise, the evidence of the senses would amount to no more than Cassio's drunken vision—"a mass of things, but nothing distinct." It would serve only to perplex and misguide those who sought it as a means of information.

¹ Locke on the Understanding.

But there is still a broad and palpable distinction between Direct and Presumptive Evidence. In the former we credit the language of the senses as translated through the judgment of the witness, and certified by his solemn asseveration. The question then for decision is not one of inference but of credibility. It is true that the credibility of the witness is itself a matter of inference, which must be gathered from his demeanour and surrounding circumstances. But when we are satisfied as to his veracity and judgment the adoption of his statements follows as an included consequence.

It is different in Presumptive Evidence. The same question of credibility occurs at the outset; and the judge or jury has to decide a similar and preliminary inquiry into the veracity and accuracy of the witness. But this is only a first and easy stage of reasoning. When the reality of the collateral fact has been established, it is then that the judgment has to trace its relation to the matter in issue. It must not disdain to weigh remote analogies, distant affinities, nor even improbable possibilities. On the other hand it must avoid scrupulously the tendency to over-refinement, which vitiates many subtle and imaginative minds. Only knowledge of the world, and an extensive experience of human nature, can enable men to determine, and that only in their own minds, what is the distinction between that proximate or recondite circumstance, which suggests irresistibly the truth or falsehood of a proposition: and that irrelevant, obscure, and suspicious form of hypothesis, which checks us as irresistibly in making it the basis of affirmation or negation.¹

In *The King v. Burdett*,² Abbott, C. J., said:

“A presumption of any fact is properly an inference of that fact from other facts that are known; it is an

¹ See this subject fully discussed in Bentham's *Rationale of Judicial Evidence*, vol. 3, page 7, *et seq.*, and Sup. p. 2.

² 4 B. & Ald. 161.

act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction; if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know that where reasonable doubt is entertained it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement."

[EV.]

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In the same case his Lordship recognised a principle which, although laid down by Lord Hale, and correct to a large extent, does not appear, according to other cases, to be true universally. The rule is—*Never to convict where the corpus delicti, the substantial crime, is not established.* An illustration of this rule has been already mentioned.¹

In *Evans v. Evans*,² Lord Stowell said:—"It has been asked, and very properly asked, Do not courts of justice admit presumptive proof? Do you expect ocular proof in all cases? I take the rule to be this : —If you have a criminal fact ascertained, you may then take presumptive proof to show who did it : to fix the criminal, having then an actual *corpus delicti*. . . . But to take presumption in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumption." But the same learned judge, in a later case,³ stated luminously the evidence which is required in cases of adultery; and his judgment there seems to contain a more comprehensive statement of this rule.

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by a fair and necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally . . . because they may be infinitely diversified by the situation and character of the parties, by the

¹ Supra, p. 4.

² 1 Hagg. Cons. Rep. 105.

³ 2 Hagg. Cons. Rep. 2.

state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations. Neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature, they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.”¹

Presumptions are said to be either presumptions of law or of fact. But as this distinction appears to be more technical and artificial than real, it will not be attempted to define it. Some presumptions are conclusive, and others are disputable. The following are prominent examples of both classes.

The law presumes innocence.

Thus the proof of guilt lies generally on the prosecutor, and where that is deficient, the prisoner must be acquitted; and this is so, even where the act charged is only one of omission. Where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving a negative on the

¹ Sup. p. 2.

other side. Thus, where the plaintiff declared that the defendant, who had chartered his ship, put on board a combustible article by which loss was occasioned, *without due notice* to the captain, it was held that the plaintiff must prove his negative averment, because the law will not presume negligence which amounts to a criminal neglect of duty.¹ Thus, also, the law will not presume fraud; and therefore generally where fraud is pleaded it must be proved, or at least some *primâ facie* evidence of it given, when it will lie on the opposite party to disprove the allegation.²

So in bigamy the prosecution must prove that the first husband or wife was alive at the date of the second marriage.³ But when the first husband or wife has not been heard of for seven years, it seems doubtful, under 9 Geo. 4, c. 31, s. 22, whether the prosecutor must prove that the prisoner knew of the existence of such first husband or wife: or whether the prisoner must prove ignorance of it.⁴

This rule also is subject to the qualification that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative.⁵

Thus, before the New Game Law, it was held in the above case, that a conviction against a carrier, for having game unlawfully in his possession, was good without any averment negating his qualification. It was also assumed in this case that, in proceedings under the old Game Law, the person professing a qualification must prove it. This view of the law has since been confirmed in this particular case by the

¹ Per Lord Ellenborough, *Williams v. East India Company*, 3 East, 199.

² *Mather v. Lord Maidstone*, 26 L. J. 58, C. P., and *infra*.

³ *R. v. Twining*, 2 B. & Ald. 386.

⁴ *R. v. Briggs*, 26 L. J. 7, M. C.

⁵ Bayley, J., *R. v. Turner*, 5 M. & S. 211.

1 & 2 Will. 4, c. 32, s. 42. So on an indictment for night-poaching it is unnecessary to prove want of leave and licence; and it is enough to show that the prisoner was on the land; for the circumstances raise a presumption of illegality, and the jury may infer the want of licence.¹

The law presumes in criminal matters that every person intends the probable consequence of an act which may be highly injurious.²

Thus, in homicide, when the death is proved, malice is presumed; and it is for the prisoner to prove the extenuating circumstances which may reduce the act from murder to manslaughter, or to justifiable or excusable homicide.³ So in an action for libel, it was held, that a judge is wrong in leaving it to a jury to say whether the defendant intended to injure the plaintiff, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act.⁴ In *Bromage v. Prosser*,⁵ Bayley, J., said:—

“Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally* and without just cause or excuse. . . . And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not;

¹ *R. v. Wood*, 25 L. J. 96, M. C.

² Lord Ellenborough, *R. v. Dixon*, 3 M. & S. 15.

³ Wels. Cr. Pr. 495.

⁴ *Havie v. Wilson*, 9 B. & C. 643.

⁵ 4 B. & C. 255.

and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? . . . And I apprehend the law recognises this distinction between these two kinds of malice,—malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken *maliciously*. . . . But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask it or have a right to expect it, *malice in fact* must be proved by the plaintiff," *i. e.* in such cases, it must be proved that the false representations were made with a knowledge of their falsehood. A privileged communication was defined in *Somerville v. Hawkins*,¹ to be one made "*bonâ fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words."

Omnia præsumentur ritè esse acta. It is a general presumption of law that a person acting in a public capacity is duly authorised so to do.²

It is presumed that all who act as justices of the peace, or as constables, have been duly appointed,³ On an indictment for having committed perjury before a surrogate of the Ecclesiastical Court, proof that the person who administered the oath acted as surrogate has been held sufficient *primâ facie* evidence that he had been duly appointed, and had authority to administer the oath.⁴ But this evidence is *only primâ facie*, and may be rebutted.⁵ And the rule does not apply to

¹ 20 L. J. 131, C. P., and *Wenman v. Ash*, 22 L. J. 191, C. P.

² Lord Ellenborough: *R. v. Verelst*, 3 Camp. 433.

³ *Berryman v. Wise*, 4 T. R. 366.

⁴ *R. v. Verelst*, sup.

⁵ Rosc. N. P. 30.

private appointments such as tithe-collectors, or assignees of a bankrupt, or a town-clerk;¹ for in these cases the appointments must be proved. But a private document is presumed to have been written at the time when it bears date.² Where indentures of a pauper's apprenticeship would have been invalid, if not executed in conformity with the rules of the Poor Law Commissioners, and there was no evidence to show that their regulations had been observed; it was held, that, in the absence of contradictory evidence, it must be presumed that the regulation had been observed.³ So generally the orders of justices will be presumed to have been made according to all statutory formalities.⁴ Thus, when to prove a parish apprenticeship secondary evidence of a lost indenture was admitted, it was presumed that the indenture had been executed according to all the requisites of 56 Geo. 3, c. 139, because there was evidence that an arrangement for the apprenticeship had been made before magistrates and that an apprenticeship had subsequently existed.⁵ But it seems that it would be otherwise where there is no such evidence.⁶ This rule in similar cases has been extended to the principle that that may be presumed which accounts reasonably for an existing state of things. Therefore, the fact that a person served an apprenticeship raises a presumption that he was duly bound an apprentice sufficiently, where the indenture had been sought in vain, to create a settlement by apprenticeship.⁷ So the fact of a marriage having taken place before a registrar in a chapel raises the presumption that the chapel was properly registered and the marriage legal.⁸

¹ *R. v. Mayor of Stamford*, 6 Q. B. 433.

² *Malpas v. Clements*, 19 L. J. 435, Q. B.

³ *R. v. St. Mary Magdalen*, 23 L. J. 1, M. C.

⁴ *Williams v. Eyton*, 27 L. J. 177, Ex.; Sc. Cam. 28 L. J. 146, Ex.

⁵ *R. v. Broadhempston*, 28 L. J. 18, M. C.

⁶ *R. v. E. Stonehouse*, 16 L. J. 49, M. C.

⁷ *R. v. Fordingbridge*, 27 L. J. 290, M. C.

⁸ *R. v. Mainwaring*, 26 L. J. 11, M. C.: 7 Cox Crim. Cas. 192.

It will be seen from these cases that the rule has been extended from the acts of public servants to the purport of public and even some private instruments. Thus public records are evidence of their own authenticity, and may now generally be proved by exemplifications or examined copies.¹ It would also appear that it is from a restricted application of the same rule that deeds and wills are presumed to have been duly executed where thirty years have elapsed from the time of their execution.² The Statutes of Limitation, according to which simple contract debts cannot be recovered after six years; specialty debts after twenty years; and land after an undisturbed possession of twenty years;³ are all founded on the same legal presumption, that an omission to prosecute a legal claim for a certain number of years, amounts to an admission that no adverse claim exists, and must be treated as such by the community. Accordingly it is presumed, under such circumstances, that the debts have been paid and the land duly conveyed: and no evidence of a different state of facts will be received.

Omnia præsumentur contra spoliatorem. If a man, by his own wrongful act, withhold the evidence by which the facts of the case would be manifested, every presumption to his disadvantage will be adopted.

In *Armory v. Delamirie*,⁴ the plaintiff, a boy, had found a jewel, which he gave for inspection to the defendant, a jeweller; and in trover for it, it was held, that unless the defendant produced it, the jury must presume it to be of the first water. But this presumption only arises where there is a suspicion of fraud.

¹ 14 & 15 Vict. c. 99, s. 14.

² *Doe d. Oldham v. Walley*, 8 B. & C. 22.

³ *Nepean v. Doe*, '2 Sm. L. C. 396, notes.

⁴ 1 Sm. L. C. 153, notes to *Armory v. Delamirie*.

And where the deficiency of evidence arises from negligence, the party who is accountable for it cannot be benefited by it. Thus, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles; Lord Ellenborough told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt.¹ But if a devisee under a first will destroy a subsequent will, it will be presumed as against him that the first will has been revoked.² The refusal, however, to produce documents on notice, is not ground for any inference as to their contents.³ In the case of wills, if a will be sought in a likely place after the testator's death, and be not found, it is presumed either to have been revoked,⁴ or never to have existed.⁵ But these presumptions are rebuttable.⁶

Where the issue is upon the life or death of a person who has been once shown to be living, the proof of the fact lies on the party who asserts the death, for the presumption is that the person continues alive until the contrary be shown.⁷ But where it is proved that the person has not been heard of for seven years, a presumption arises that he is dead. This presumption relates only to the fact of death; and the time of death, whenever it is material, must be a subject of distinct proof; for the court will not presume the continuance of life up to the end, or to any precise point of the seven years.⁸

Where several persons have perished in the same calamity, the presumption is said to be in favour of

¹ *Clunnes v. Pezzey*, 1 Camp. 8.

² *Harwood v. Goodright*, Cowp. 86, per Lord Mansfield.

³ *Cooper v. Gibson*, 3 Camp. 363.

⁴ *Brown v. Brown*, 27 L. J. 173, Q. B.; 31 L. T. Rep. 297.

⁵ *R. v. Johnson*, 27 L. J. 52, M. C.

⁶ *Patten v. Poulton*, 27 L. J. 41, P. & M.; 31 L. T. Rep. 40.

⁷ *Wilson v. Hodge*, 2 East, 313.

⁸ *Nepean v. Doe*, 2 M. & W. 910; S. C. and 2 Sm. L. C. 308.

the survival of the stronger party.¹ But this doctrine has caused much controversy; and in a late case where it appeared that a husband, a wife, and their two children were washed off from the deck of a ship by the same wave and drowned; the Master of the Rolls held that in the absence of further evidence it must be presumed that all died at the same moment.²

By the law of marine insurance, if a vessel has sailed, and no tidings of her have been received within a reasonable time, she shall be presumed to have foundered at sea.³ And if a ship, shortly after sailing, shall, without visible or adequate cause, become leaky or otherwise incapable of performing the voyage insured, she shall be presumed to have been unseaworthy at the commencement of the risk.⁴ But this last rule does not appear to be quite established.⁵

Where goods have been lost or damaged while in the custody of a bailee or his servants, it is presumed that the loss or damage arises from his negligence.⁶ This presumption appears to arise as much in the case of a gratuitous bailee as in that of a bailee for valuable consideration; but the liability will be limited by the rules laid down in *Coggs v. Bernard*.⁷

Partners are presumed to have authority to bind their co-partners in all matters relating to the partnership, but not in matters unconnected with it.⁸

A large class of legal presumptions is contained in the technical and abstruse doctrine of estoppel.

“The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The

¹ 1 Phill. 479; *Sillish v. Booth*, 1 Y. & Col. 117.

² *Underwood v. Wing*, 23 L. T. 339. Aff.: L. C. 24 L. J. 293, Ch.

³ Tayl. 131.

⁴ Tayl. 132.

⁵ 1 Phill. 471, cf. *Thompson v. Hopper*, 27 L. J. 441, Q. B.; 32 L. T. Rep. 38.

⁶ *Carpue v. L. and B. R.*, 5 Q. B. 747; *Latch v. Rumner Railway*, 27 L. J. 155, Ex.

⁷ 2 Lord Raym. 918; 1 Sm. L. C. 82, and notes.

⁸ *Sandilands v. Marsh*, 2 B. & Ald. 673; *Bales v. Westwood*, 2 Camp. 12.

principle is, that where a man has entered into a solemn engagement by deed under his hand and seal, he shall not be permitted to deny any matter which he has so asserted.”¹ The presumption is, that that is true which the deliberate act or statement of the party estopped has affirmed. A *primâ facie* presumption of the same kind arises also from parol admissions,² and extends to all who are identified in interest with the estopped party.³

It is held that *parties to deeds are concluded by recitals as to specific facts*. In *Bowman v. Taylor*,⁴ Lord Denman said : “As to the doctrine laid down in Co. Litt. 352 b., that a recital doth not conclude because it is no direct affirmation, the authority of Lord Coke is a very great one ; but still, if a party has, by his deed, recited a specific fact, though introduced by ‘whereas,’ it seems to me impossible to say that he shall not be bound by his own assertion so made under seal.” But evidence may be given to explain a record.⁵

A tenant cannot dispute his landlord’s title.

“The security of landlords would be infinitely endangered if such a proceeding were allowed.”⁶ But although a tenant cannot be permitted to prove that his landlord never had any title, he may show that his title has expired.⁷

It is presumed that if a tenant show a receipt for rent, all previous rent has been paid by him to the landlord.⁸ A mortgagor in possession is presumed to have authority to distrain as the bailiff of the mortgagee.⁹

¹ Per Taunton, J., *Bowman v. Taylor*, 2 Ad. & El. 291.

² *Bringloe v. Goodson*, 5 Bing. N. C. 739.

³ 2 Sm. L. C., notes to *Duchess of Kingston’s case*.

⁴ *Supra*.

⁵ *Preston v. Peeke*, 27 L. J. 424, Q. B.

⁶ Lord Ellenborough: *Balls v. Westwood*, 2 Camp. 12.

⁷ *England v. Slade*, 4 T. R. 682. ⁸ 1 Phill. 492.

⁹ *Trent v. Hunt*, 22 L. J. 318, Ex.

The above are examples of the principal presumptions of law which arise when a particular state of facts has been established. But an exhaustive treatment of the subject is beyond the limits of this work.

It has been remarked, that it is not very easy to distinguish those presumptions which are binding on a jury from those which they are at liberty to disregard and to negative by their verdict, even when not rebutted.¹ It is also difficult to draw the precise line between conclusive and disputable presumptions; between those which operate in the nature of estoppel, and those which are merely *primâ facie* and rebuttable in character. The solution of the difficulty will be found in a clear comprehension of the law of estoppel. In *Jayne v. Price*,² Heath, J., said: "Nothing can be clearer than this: *a presumption may be rebutted by a contrary and stronger presumption;*" and it was decided in that case, that although proof of possession of land and receipt of rents is *primâ facie* evidence of a seisin in fee, yet proof of forty years' subsequent possession by a daughter, while a son and heir lived near and knew the fact, is much stronger evidence that the first possessor had only a particular estate.

¹ Rosc. N. P. 24.

² 5 Taunt. 326.

CHAPTER VI.

ON EVIDENCE IN MATTERS OF OPINION.

SINCE it is the province of the judge or of the jury, according to the principles of presumptive evidence, to draw all inferences from facts, it follows that—

A witness must only state facts: and his mere personal opinion is not evidence.

The object of this rule is to keep the witness, as much as possible, from trespassing on the functions of either judge or jury; and it is relaxed as often as an opinion of a witness can be regarded in the nature of a presumptive fact. Thus, in cases of insanity a medical witness cannot be asked whether he considers that the patient was insane; for that is the issue for the court and jury; but he may be asked whether certain symptoms are indications of insanity, and his answers are evidence for the guidance of the court and jury.¹ Thus, on an issue as to the sanity of a testator, Sir F. Thesiger, for the defendant, tendered a letter (purporting to be from the testator) to a medical witness, and proposed to ask him whether the writer of such a letter could be of sound mind. Martin, B., held that this could not be done; but that the letter must first be proved to be in the testator's writing, and that the witness might then be asked if it was a rational letter.²

¹ *R. v. M'Naghten*, 10 Cl. & Fin. 200.

² *Sharpe v. Mucalway*, Western Circuit, 1856, MS.

Accordingly, in actions of slander, where it is important to prove an innuendo and that the obvious and natural meaning of a word was not that which the speaker intended to convey to the witness, the witness cannot be asked what he understood by the language; for the answer to such a question would be in the nature of an inference and a mere personal opinion. But questions ought to be put to him which tend to elicit all the surrounding facts and circumstances which led him to understand the words in a slanderous sense; and he may be asked whether there was irony in the speaker's tone at the time, and generally whether there was anything to prevent him from understanding the words in their ordinary sense.¹

In the leading case of *Carter v. Boehm*,² it was a question whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the underwriters. A broker gave evidence of the materiality of the facts, and stated his opinion, that if they had been disclosed the policy would not have been underwritten; but the court held his statement to be inadmissible. Lord Mansfield said: "Great stress was laid upon the opinion of the broker; but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence; it is opinion after an event; it is opinion without the least foundation from any previous precedent or usage; it is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause, and, therefore, it is improper and irrelevant in the mouth of a witness."

This judgment of Lord Mansfield contains the principles on which mere opinion is not received as evidence. But it is right to state that his view of the law, as to this particular case, has been much controverted; and that it has been considered by other learned authorities,³

¹ *Davies v. Hartley*, 3 Exch. 200; *Barnett v. Allen*, 27 L. J. 412, Ex.; 31 L. T. Rep. 217.

² 3 Burr. 1905; 1 Sm. L. C. 270.

³ See note to *Carter v. Boehm*, 1 Sm. L. C.

to come within the exception to the rule which is now to be stated ; for it is held that—

The opinions of skilled or scientific witnesses are admissible evidence to elucidate matters which are of a strictly professional or scientific character.

In *Campbell v. Richards*,¹ Lord Denman, C. J., said :—

“ Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinions on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another. In the great case of *Carter v. Boehm*, a broker, who was called as a witness for the plaintiff, stated on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten. The jury, however, found, against the witness’s opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord Mansfield, in the name of the whole court, declared that the jury ought not to pay the least regard to it, because it was mere opinion and not evidence. The same doctrine is laid down in a case of *Durrell v. Bederley*, by Gibbs, C. J., though he received the evidence on great pressure. He said, ‘The opinion of the underwriters on the materiality of facts and the effect they would have had upon the premium, is not admissible in evidence.’ Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury and not of individual underwriters to decide that facts ought to be communicated. It is not a question of

¹ 5 B. & Ad. 846.

science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory and ought to be rejected."

It will appear from this judgment that the two rules, as stated above, are recognised and acted on universally; and that the only practical difficulty in applying them, exists in the question as to what is and what is not a subject of scientific inquiry. The inclination of modern authorities appears to be to enlarge the definition; and it is probable that if *Carter v. Boehm*, and *Campbell v. Richards*, were to be decided again, it would be held that the nature of mercantile traffic, and the principles of insurance in particular, are sufficiently recondite to entitle them to the privilege which was disallowed in those cases.¹ And in *Greville v. Chapman*,² which was an action for libel arising out of a racehorse transaction, it was held by Lord Denman himself, that a member of the Jockey-club might be asked as a witness, whether he did not consider a certain course of conduct to be dishonourable.

Books are admissible to show the sense in which words are used; and especially in cases of libel defendants have been permitted to refer largely to previous publications, and to read them as part of their defence, in order to show that certain forms of expression were not meant as matter of reproach or ridicule; and to explain whether they have been used in a metaphorical or literal sense. Books also may be used to show the opinions of their writers on their subjects; but such opinions cannot be made evidence of specific facts. "Thus, it is not competent in an action for not farming according to covenant, to refer to books for the purpose of showing what is the best way of farming. Nor in an action on the warranty of a horse would it be allowable to refer

¹ 1 Sm. L. C. 286 a., *Richards v. Murdock*, 10 B. & C. 527.

² 5 Q. B. 731.

to works of a veterinary surgeon to show what is unsoundness.”¹ So in an action for a libel charging the plaintiff with being a rebel and traitor, “because he was a Roman Catholic,” the defendant was not allowed to justify by citing books of authority among the Roman Catholics, which seemed to show that their doctrines were inimical to loyalty.² In all such cases, as also in the proof of foreign law, the evidence is matter of science which must be given by expert and scientific witnesses in court. Books are only hearsay: often of the most vague, inconsistent and remote character; statements made by absent, perhaps anonymous, witnesses, who wrote without being under the fear of the spiritual or secular penalties of an oath, and without being subject to cross-examination. It is plain, therefore, on the first principles of evidence, that they are without any of the elements of legal credibility.

Ancient writings may be proved by a skilled witness to whom they have been submitted for examination as to their authenticity.³ And by the 17 & 18 Vict. c. 125, s. 27, comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury, as evidence of the genuineness or otherwise of the writings in dispute.

¹ Per Cur.: *Darby v. Ousley*, 25 L. J. 232, Ex.

² *Ibid.*

³ *Roe d. Bruns v. Rawlins*, 7 East, 279.

CHAPTER VII.

ON PRIVILEGED KNOWLEDGE AND COMMUNICATIONS.

HITHERTO we have been considering chiefly the principles by which evidence is admitted in courts of justice. We are now to consider, 1st, the principles by which certain classes of evidence are excluded; and 2nd, the principles by which certain real or apparent exceptions to these rules of exclusion are re-admitted in evidence.

It was a principle of the common law that large classes of evidence were wholly without the elements of truth and safe guidance. As such, they were withdrawn entirely from the consideration of juries. Hence, in the course of centuries, the basis of legal evidence had widened to one of rigid and irrational exclusion. The contingency, or probability of deception from certain sources of evidence, had made our courts lose sight entirely of the contingency or probability of truth flowing from the same sources. To distinguish good from evil; to adopt the one and reject the other; were faculties and abilities which juries were not supposed to possess; although, inconsistently enough, they were presumed to possess the diagnostic power of pronouncing on the relative value of conflicting evidence, and of drawing inferences which required consummate practical knowledge of inductive logic.

It has been, and will probably long continue to be, the object of the Legislature to lessen and gradually remove these anomalies of the old law. The ancient law of exclusion in matters of evidence has been

abridged about half within the last fifteen years, and the new law is founded entirely on the principle of admission. It is the tendency of the age to permit and to require every description of evidence, from which information may possibly be derived, to be produced and submitted to courts and juries, however contaminated, or doubtful, or remote its source may appear to be. It is still as much as ever an inviolable principle that no man shall be unfairly prejudiced by his own statements, or the careless language of others ; but the great object of courts in modern times is to accumulate as much miscellaneous evidence as possible on every issue, and to leave the question of credibility—the privilege and the duty of distinguishing the gradations of value—to the intelligence of a court or jury of practical men.

Except when some positive rule intervenes, a witness may be asked, and will be compelled to answer, any question that may be put to him. It seems also to be understood now, that a witness may be *asked* any question ; but there are many questions which he will not be compellable, and some which he will not be permitted, to *answer*. So in documentary evidence every writing is admissible, except when it is excluded by a similar principle of law.

But there are still many kinds of evidence which, from principles of public policy, are altogether excluded from the consideration of courts and juries ; and the first and most important is that by which a witness may refuse to answer any question which tends to expose him to a charge of a criminal nature. This privilege rests on the fundamental maxim of the common law, *nemo tenetur seipsum prodere*, and is the intuitive principle of self-defence recognised as the political and social right of every citizen. It was disregarded formerly when the law recognised torture and arbitrary proceedings, such as disgraced the judges before whom Sir Walter Raleigh was tried, when the prisoner was subjected to a system of interrogation such as exists now in France and most continental countries. Such

a system, although revolting to English ideas when it assumes a compulsory form, is perhaps advantageous to the cause of justice when of a voluntary kind ; and it is matter of daily observation that a prisoner is exposed to an unfair disadvantage in not being permitted to pledge his own oath against that of the prosecution, which, it may be, rests only on the oath of a single and uncorroborated witness. Nor is the system consistent as it exists ; for while a prisoner is not permitted to defend himself on oath, but only to address the jury in a speech, which weighs little, because it is not on oath ; his own statements before a committing magistrate, and voluntary confessions, are employed constantly as almost conclusive evidence against him. But with these limitations, it is an established general rule, confirmed by statute, but subject to limitations, that—

A witness is not compellable to answer any question tending to criminate himself.

He cannot be compelled to answer any question, the answer to which may expose, or tend to expose, him to a criminal charge of any kind. This rule is recognised and expressed by the Law of Evidence Amendment Act, 1851, which, after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the act shall render any person compellable to answer any question tending to criminate himself or herself.¹

Some difficulty has arisen in the application of this rule, and some diversity of opinion appears to exist as to its construction and extent. It is still doubtful in some measure whether the witness is entitled to his privilege as of right, or only under the sanction of the

¹ 14 & 15 Vict. c. 99, s. 3. Sup. p. 29.

court. In *R. v. Garbett*,¹ it was held that a witness is not compellable to answer a question, if the court be of opinion that the answer might tend to criminate him. It was also held in the same case that the court may compel a witness to answer any such question ; but that if the answer be subsequently used against the witness in a criminal proceeding, and a conviction obtained, judgment will be respited and the conviction reversed. But in a later case,² Maule, J., and Jervis, C. J., held that it is for the witness to exercise his own judgment, and to say whether the answer will criminate him, and that if he thinks that it will, he may refuse to answer. This view was doubted by Parke, B., in a later case,³ where the learned judge indicated his adhesion to the doctrine of *R. v. Garbett*. In this conflict of authorities this question must be considered to be still unsettled.

It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him, and that he will refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn and the objectionable question put to him.⁴ A judge ought to caution a witness, where a privilege exists, that he is not bound to answer.⁵

The rule that only the witness in person can claim his privilege, extends to interrogatories ; and it is settled that the court will not refuse to grant them, on the affidavit of a party's attorney that they will tend to criminate the party against whom they are sought;⁶ and generally interrogatories will never be refused on the ground that the party is privileged from answering

¹ 1 Den. C. C. 236.

² *Fisher v. Ronalds*, 22 L. J. 63, C. P.

³ *Osborne v. London Dock Company*, 24 L. J. 140, Ex.

⁴ *Boyle v. Wiseman*, 24 L. J. 160, Ex.

⁵ Maule, J.: *Fisher v. Ronalds*, sup. p. 63.

⁶ *Osborne v. London Dock Company*, sup. p. 69.

them ; but he may claim his privilege as sufficient cause for refusing to answer them.¹

A witness may waive his privilege and answer at his peril. He cannot refuse to answer any question, relevant to the issue, on the ground that his answer would expose him to a civil action.² But the privilege extends to cases in which an answer might subject him to penalties or forfeitures.³

Many difficulties have arisen and still exist in the application of the general rule in consequence of the special limitations which have been put on it by several statutes, which have enacted expressly that a witness cannot refuse to answer matters to which they refer, on the ground that the answers would criminate him ; but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction. This compulsion and indemnity apply to witnesses on prosecutions for unlawful combinations of workmen ;⁴ to disclosures on oath in a judicial proceeding, and before indictment, of any act done by any banker, merchant, broker, factor, attorney, or other agent;⁵ to prosecutions against gaming-house keepers;⁶ and to actions for penalties under the Corrupt Practices at Elections Act.⁷ So by the Fraudulent Trustees Act,⁸ no person can refuse, in any civil proceeding, to answer any question on the ground that it would expose him to an indictment under the Act ; but the answer cannot be given in evidence against him on a prosecution under the act.

The object of the Legislature in these special enactments has been to combine the necessary discovery of truth with the due protection of the witness ; and

¹ *Chester v. Wortley*, 25 L. J. 117, C. P.

² 46 Geo. 3, c. 37.

³ *Cates v. Hardacre*, 3 Taunt. 424.

⁴ 6 Geo. 4, c. 129, s. 6.

⁵ 7 Geo. 4, c. 29, s. 52 ; 5 & 6 Vict. c. 39, s. 6.

⁶ 8 & 9 Vict. c. 109, s. 9.

⁷ 17 & 18 Vict. c. 102, s. 35.

⁸ 20 & 21 Vict. c. 54, s. 11.

therefore while it compels him to answer, it makes the answer in all cases harmless to him, and in some beneficial ; for in most of the above cases, not only cannot the answer be used against him in any criminal proceeding, but he cannot be convicted subsequently by any evidence whatever of any offence provable by the extorted answer. But when the original proceedings are under the Bankruptcy Acts, the extent of a witness's privilege has been a subject of much controversy, and is still one of some uncertainty. Where the bankrupt answers without claiming his privilege his answer may be given in evidence against him on a criminal charge, precisely as any voluntary statement is at all times admissible against a prisoner.¹ And even when the answer is clearly compulsory, or where it was obtained from the bankrupt by a threat of the commissioner that he would commit him if he did not answer a clearly criminatory question; it was held by a majority of judges that as such a question may be put to him lawfully under the Bankruptcy Act,² by which a bankrupt may be examined touching all matters relating to his trade, dealings, or estate; therefore, the privilege of the witness is removed by statute, and therefore the answer may be used against him on a criminal charge. "The result seems to be that a question cannot be put to a bankrupt which does not touch his trade, dealings, or estate, or the direct object of which is to show that he has committed a criminal act; yet that he cannot refuse to answer a question which does touch his trade, dealings, or estate, although the answer may seem to show that he has concealed his effects or been guilty of any other offence connected with his bankruptcy."³ This doctrine was dissented from by Coleridge, J.,⁴ and has been doubted since.⁵ In the latest case⁶ the prisoners had been

¹ *R. v. Sloggett*, 25 L. J. 93, M. C.

² 12 & 13 Vict. c. 106, s. 117.

³ Per Lord Campbell, C. J.: *R. v. Scott*, 7 Cox Crim. Cas. 164.

⁴ *Ib.* 133.

⁵ *R. v. Skeene*, 28 L. J. 91, M. C.

⁶ *Ib.*

indicted under 5 & 6 Vict. c. 39, for embezzlement as brokers and agents, and relied on the 6th section, which provides "that no agent shall be liable to be convicted by any evidence whatsoever in respect of any act done by him if he shall at any time previously to his being indicted for such offence have disclosed the same in any examination or deposition before any commissioner in bankruptcy." After committal the prisoners stated facts before the commissioner, which had been proved already before the magistrate, and on which they were subsequently convicted. They relied on their depositions before the commissioner as a statutory defence. A majority of the court held against a large minority that a statement by the prisoners of facts which were known previously aliunde was not a disclosure within the statute, and that therefore, the prisoners were properly convicted. But the judgment of the minority is remarkable for a strong disapproval of the judgment in *R. v. Scott*; and although the law must be held to be at present as settled by that case, it is not unlikely that it will be again brought in question.

When the question is merely degrading to the witness, and its object is to discredit his testimony by showing him to be of a disreputable character, the authorities are conflicting as to the privilege of the witness in refusing to answer. Generally, it appears to be clear that such a question may be asked; but that where it is not material to the issue, and its object is merely to degrade the character of the witness, he is not compellable to answer it. Thus, on a charge of rape, the prosecutrix cannot be compelled to say whether she has had connection with other men, or particular persons; nor can evidence of such connection be received. So, in an action of seduction, the woman is not compellable to say whether she has had connection with other men previous to the alleged

¹ *R. v. Hodgson*, 1 Russ. & R. 211.

seduction; but the defendant may prove such previous connection in reduction of damages.¹

Counsel, solicitors, and attorneys cannot be compelled to disclose communications which have been made to them in professional confidence by their clients.²

When the relation of attorney and client, or of counsel and client, has been established, then this rule operates; and neither the attorney nor counsel can be compelled or permitted,³ without the consent of the client, to make any disclosure or admission which may be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy.

When an attorney holds a document for his client, he cannot, against the will of his client, be compelled to produce it by a person who has an equal interest in it with his client.⁴ But an attorney may be asked whether he has papers of his client in court; and if by his answer, which is compulsory, he admit the fact, secondary evidence of their contents may be given if the originals are not produced.⁵ But if an attorney be subpoenaed to produce a document which he holds for a client, he may, in his discretion, refuse to produce it, and to answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld.⁶

In a recent case⁷ an attorney had been subpoenaed to produce a deed which, at the trial, he refused to produce by the express instruction of his client. The

¹ *Dodd v. Norris*, 3 Camp. 519.

² *R. v. Duchess of Kingston*, 20 How. St. Tr. 612.

³ *Wilson v. Rastall*, 4 T. R. 759.

⁴ *Newton v. Chaplin*, 19 L. J. 374, C. P.

⁵ *Dwyer v. Collins*, 21 L. J. 225, Ex.

⁶ *Volant v. Soyer*, 22 L. J. 83, C. P.

⁷ *Phelps and another v. Drew*, 23 L. J. 140, Q. B.

party by whom he was subpoenaed then called another witness to give secondary evidence of the deed, by means of a copy. The second witness stated that he had a copy of a deed, but that he did not know whether it was a copy of the deed in question unless he was suffered to look at the deed. It was then suggested that he should be allowed to look at the names of the parcels and the parties to the deed, in order to identify it. The first witness still objected, and it was also contended on the opposite side, that the first witness's client ought to have been called to show that he had given the prohibition, and that all sources of primary evidence had been exhausted. The judge, however, ordered that the second witness should be allowed to look at the indorsement of the deed; and when the latter had thus identified it, the judge received the copy as secondary evidence. An application for a new trial was made, on the ground that this evidence was improperly admitted; but the court upheld the ruling of the *Nisi Prius* judge on both points. Coleridge, J., said:—

“It is said that secondary evidence of the deed is not admissible, because all was not done to exhaust the means of obtaining primary evidence; the facts being that the defendant being desirous of the production of the deed in evidence, the attorney of the party interested was served with a *subpœna duces tecum*, and was present at the trial with the deed, and on being called on to produce the deed, he stated that it was the title deed of his client, and that he had received instructions from his client not to produce it. It is admitted that, where an original instrument is properly withheld on the ground of privilege, secondary evidence of the contents of the instrument is receivable; but here it is said, that the privilege, though properly put forward by the attorney, might have been waived by the client if he had been in Court, and therefore this cannot be considered as an instrument properly withheld on the ground of privilege, because no steps had been taken to procure the attendance of

the client at the trial. Now, questions of this sort are, after all, resolvable into what is reasonable with reference to the circumstances of the particular case. The true ground is, whether it was reasonable for the party to go further under the particular circumstances of the case; and I think it was not reasonable to require the party to go further. There was distinct evidence of the privilege being insisted upon by the client. In addition to the refusal by the attorney, he had received express instructions from his client not to produce the deed, which took away all discretion on the part of the attorney; and this was the state of things at the time when the privilege was claimed. The judge was right in assuming that the client remained of the same mind, and that there was nothing to alter that state of things. I think, therefore, enough was done to let in secondary evidence. Then, the second objection is, that the judge improperly overruled the privilege in the next step in the cause. There being some doubt, when the next witness was called, whether the draft which the witness was speaking of was a draft of the deed in question, the judge, in order to ascertain that, compelled the attorney to produce the document for the purpose of identification. It was contended that it was a breach of privilege to produce the deed in evidence for any purpose whatever. But whether it is a breach of the privilege or not, must depend upon the circumstances of each case. I quite agree that sometimes, as in *Brand v. Akerman*, the process of identification will require a disclosure of the contents of the deed; and, if so, I think the inquiry must stop. But here I do not see that anything was done that had the effect of disclosing the contents of the deed, or violating any of the secrets which the attorney had intrusted to him by his client. The indorsement might disclose that the deed was an assignment; but of what property, and whether it was of the legal or equitable estate, it would not disclose. I think, therefore, the learned judge was right."

It was left doubtful in this case whether the improper admission or rejection of this kind of evidence is ground for a new trial. The Court of Queen's Bench had previously decided this question in the negative;¹ and the Court of Common Pleas in the affirmative.²

The rule of professional confidence is held to extend to all cases in which the attorney or counsel has been confided in as such, but not to cases where the confidence was given before the relation was formed; or after it has ceased. In *Gainsford v. Gramnar*,³ Lord Ellenborough said: "I fully accede to the doctrine laid down in *Cobden v. Kendrick*, and *Wilson v. Rastall*, which is no more than this, that a communication by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, is not privileged. But this relation may be formed before the commencement of any suit. The attorney may be retained and confided in as such in contemplation of a suit; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out of, or the service of, the writ?"⁴ The privilege is also held to extend to the clerks of attorneys and barristers to whom communications have been made as such;⁵ and to an unprofessional agent employed by a solicitor's advice to obtain information for a client;⁶ but not to cases where the communication has been made to the attorney,⁷ or his clerk,⁸ while they have not been acting in their professional character. And a person who is not an attorney, in whom confidence has been placed

¹ *Marston v. Downes*, 1 A. & E. 31.

² *Doe d. Peter v. Watkins*, 3 Bing. N. C. 421.

³ 2 Camp. 10.

⁴ See also Lord Tenterden, *Clark v. Clark*, 1 M. & R. 5.

⁵ *Taylor v. Forster*, 2 C. & P. 195; *Foote v. Hayne*, R. & M. 165.

⁶ *Lafone v. Falkland &c. Company*, 4 K. & J. 39.

⁷ *R. v. Brewer*, 6 C. & P. 363.

⁸ *Doe d. Pritchard v. Jauncy*, 8 C. & P. 99.

under a mistaken idea that he is an attorney, will be compelled to disclose the communication.¹

The privilege also extends to all knowledge obtained by the attorney which he would not have obtained, if he had not been consulted professionally by his client.² Thus, in an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and while holding that capacity, had obtained documentary evidence from the defendant, which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the Statute of Limitations. It was held that the evidence was inadmissible for the plaintiff, Platt, B., observing that it would never have been in the hands of the attorney, except for the purpose of his preparing a case for counsel; and Martin, B., added: "The client might be in error in thinking the communication necessary to be laid before counsel, but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged."³

A remarkable case, partially restricting this doctrine, has been decided lately. In an action for false imprisonment and malicious prosecution on a charge of felony, it became a material question whether an entry in a book, by which the plaintiff acknowledged the receipt of money which the defendant had charged him with embezzling, existed at the time when the plaintiff was examined before the magistrates, or had been made, as the defendant alleged, by the plaintiff between the examination and before the trial. The counsel who had been concerned for the plaintiff before the magistrates, but who was not concerned for him on the trial, happened to be in court on the latter occasion; and at the suggestion of Jervis, C. J., after consulting Cresswell, J., he was called for the defen-

¹ *Fountain v. Young*, 6 Esp. 113.

² *Greenhough v. Gaskell*, 1 Myl. & K. 98.

³ *Cleave v. Jones*, 21 L. J. 105, Ex.

dant, and asked whether the entry was in the book at the time of the examination before the magistrate. He gave evidence that it was not; and a verdict passed for the defendant. On a rule for a new trial on the ground that this evidence was improperly admitted, the court held that it was properly admitted, because the witness was required only to disclose something which he had seen, and not what he had been told in his position as counsel. It is perhaps difficult to reconcile this case with principle, as it is not easy to see how the witness possessed his information except by means of documents which came to him only in his character of the plaintiff's counsel.¹

Where a communication between an attorney and his client appears to be of an irrelevant unprofessional character, the attorney will be compelled to disclose it. Thus, an attorney will be compelled to state what his client has said to him on a matter in which the latter was not asking for legal advice, but only for information as to a matter of fact, even though that fact involved a question of law. Thus, in *Bramwell v. Lucas*, an action by assignees,² to prove an act of bankruptcy, it was held that the solicitor to the bankrupt is not privileged from saying whether his client had asked his opinion, whether he (the client) could attend a meeting of his creditors without danger of being arrested. The court held that the communication was not privileged, and Lord Tenterden, C. J., said: "A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as the attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle

¹ *Brown v. Foster*, 26 L. J. 249, Ex.; 28 L. T. Rep. 274.

² 2 B. & C. 749.

upon which the privilege is founded. Was, then, this a question for legal advice put to Mr. Scott in his character of attorney, or was it not a question for information as to matter of fact, in which the professional character of Mr. Scott as attorney was not considered? It can hardly be supposed that a man could ask, as a matter of law, whether he would be free from arrest whilst attending a voluntary meeting of creditors, but he might well ask, as a matter of fact, whether any arrangement had been made with the creditors to prevent an arrest."

It will be observed that this case shows a tendency to confine the rule of privileged communication within a strict limit; as, with great deference to the learned judge, it may be submitted that the question put by the bankrupt to his attorney seems to be rather one of law than of fact; and is precisely that sort of legal question which ignorant clients put constantly to their attorneys: but as the case was between third parties, perhaps a greater latitude may be presumed to have been allowed on that account.¹ But when a statement has been made by either plaintiff or defendant, in the presence of the attorney of either party, the attorney may be called to prove it.²

The rule of privileged communications has been confined strictly by the English law to the cases which have been mentioned. It does not extend to communications made confidentially to stewards,³ medical men,⁴ or clergymen.⁵ But the judges have shown an indisposition to receive communications which have been made to clergymen as such. Best, C. J., is reported to have said that he would never compel a clergyman, if he objected, to disclose such communications;⁶ and in a late case,⁷ where a woman was in-

¹ See Cottenham, C.: *Desborough v. Rawlins*, 3 Myl. & Cr. 515.

² *Griffith v. Davies*, 5 B. & Ad. 502.

³ *Earl of Falmouth v. Moss*, 11 Price, 455.

⁴ *Duchess of Kingston's case*, 20 How. St. Tr. 613; *R. v. Gibbons*, 1 C. & P. 97.

⁵ *Broad v. Pitt*, M. & M. 233.

⁶ *Ibid.*

⁷ *Reg. v. Griffin*, 6 Cox Cr. C. 219.

dicted for the murder of her child, Alderson, B., objected to hear the chaplain of the prison as a witness to conversations which he had had with the prisoner in his spiritual capacity. The learned judge said: "I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is, because, without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given." Bodkin (for the prosecution) said that after such an intimation, he should not tender the evidence.

SECT. 2. *On Evidence excluded on grounds of Public Interest.*

A witness cannot be asked, and will not be allowed to state facts, the disclosure of which may be prejudicial to any public interest.

On Hardy's trial for high treason,¹ a witness for the crown was asked on cross-examination by Mr. Erskine, whether the person to whom he had communicated a report of the proceedings of the society to which the prisoner belonged, was a magistrate of any species or description, from a justice of peace to a secretary of state. It was held by Eyre, C. J., that he might say whether the communication was made to a magistrate or not. The witness said, "It was not to a magistrate." Mr. Erskine then asked, "Then to whom was it?" The Attorney-General objected to the

¹ 24 How. St. Tr. 808.

question. Eyre, C. J., said: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against the prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channels by means of which that detection is made, should not be unnecessarily disclosed: if it can be made to appear that really and truly it is necessary for the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case." The point was subsequently discussed before the other judges, and the majority concurred with Eyre, C. J., who thus laid down the rule:¹ "My apprehension is, that among those questions which are not permitted to be asked, are all those questions which lead to the discovery of the channel by which the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice, that they are not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make the disclosure, than it is to whom he made the disclosure in consequence of the advice—than it is to ask any other question respecting the channel of communication, or all that was done under it."

It was held by Lord Ellenborough,² that a member of Parliament or the Speaker may be called on to give evidence of the fact of a member of Parliament having taken part or spoken in a particular debate; but that he cannot be asked what he then delivered in the course of the debate. It has also been held, that communications in official correspondence relating to

¹ 24 How. St. Tr. 815.

² *Plunkett v. Cobbett*, 5 Esp. 136.

matters of state cannot be produced as evidence in an action against a person holding an office, for an inquiry charged to have been done in the exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy.¹ So it has been held that communications between a governor of a province and his attorney-general are privileged.²

But the courts have occasionally shown a disposition to limit the rule. Thus, in an³ action for a penalty for acting as a parish committee-man, being at the same time a collector of the property-tax; a clerk to the commissioners of the property-tax was called, and directed to produce his books, to prove the defendant's appointment. The witness refused on the ground that he had been sworn, on his own appointment, not to disclose anything he should hear in that capacity respecting the property-tax, except with the consent of the commissioners, or by force of an act of Parliament. But Lord Ellenborough said: "I clearly think the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpoena. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him." It appears also that a grand juror may be compelled, either in civil or criminal cases, to disclose what has passed before a grand jury. So Lord Campbell, C. J.,⁴ has held that a witness cannot refuse to produce a letter which he holds from a secretary of state, to whom it has been addressed in his public character, and who forbids its production.⁵

¹ *Anderson v. Hamilton*, 2 B. & B. 156, n.

² *Wyatt v. Gore*, Holt, 299.

³ *Lee, q. t. v. Birrell*, 3 Camp. 337.

⁴ *Sykes v. Dunbar*, 2 Selw. N. P. 1059; 4 Bl. Comm. 126, note by Mr. Christian of a case at York.

⁵ *Dickson v. Lord Wilton*, Sittings after Hil. T. 1859. MS.

SECT. 3. *Evidence excluded on ground of indecency.*

Evidence may be excluded on the ground of indecency. But this rule only holds in civil cases. Thus, it is an established rule that parties shall not be permitted after marriage to say that they have had no connection.¹ And Gibbs, C. J., refused to try an action on a wager, whether an unmarried woman had had a child.² But although a wife cannot prove non-access in order to bastardize her issue; yet it appears that, if that fact is proved by other evidence, she may be examined as to collateral facts, such as the name of an adulterer, or the time of a birth.³ In criminal cases no objection can be taken to evidence on the ground of indecency; and in civil cases the rule is restricted to such as involve considerations of domestic morality; or cases in which the admission of such evidence would only tend to encourage the shameless or morbid outrage of conventional propriety.

¹ Per Lord Denman : *R. v. Inhabitant of Courton*, 5 A. & E. 188.

² *Ditchburn v. Goldsmith*, 4 Camp. 152.

³ *R. v. Luffe*, 8 East, 193; *Legge v. Edmunds*, 25 L. J. 125, Ch.

CHAPTER VIII.

ON HEARSAY EVIDENCE.

EVIDENCE is said to be *hearsay* when it purports to be the oral or written statement of a witness who is not produced in court. It is a general rule that—

Hearsay Evidence is inadmissible.

The ground for its rejection lies in the fundamental principle that evidence has no claim to credibility unless it be given on oath, and unless the party to be affected by it have an opportunity of cross-examining the witness. The distinction between direct and hearsay evidence is of the widest possible kind, when they are considered as elements of, and guides to, moral certainty. When a witness states something which he himself has either seen or heard, directly affecting the parties to a proceeding, such a statement contains clearly the requisite principles of presumptive truth. But when he states something which he has heard from a third person, the statement affords no satisfactory or reasonable information. A multitude of probable contingencies annihilate its value. Thus, it is not improbable that the witness may have misunderstood or imperfectly remembered the words of the third person ; or that the latter may have spoken hastily, inaccurately, or even falsely. It would be unjust and unreasonable that either life or property should be placed in jeopardy by the careless and commonly prejudiced and exaggerated language of daily life ; and therefore a witness is always stopped when he is about

to state something which he professes to know not from the personal cognizance of his own senses, but merely from the narrative of another person.

In the *Berkeley Peerage case*,¹ it was said by Mansfield, C. J.:—"By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. . . . Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial, the person whose cause they would have established may fail in the suit. But although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received. Upon this subject, the laws of other countries are quite different: they admit evidence of hearsay without scruple. There is not an appeal from the neighbouring kingdom of Scotland, in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland and most of the continental states, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."

Accordingly it seems that where the object of evidence is to satisfy the court on matters which are for

¹ 4 Camp. 414.

the court and not for a jury, hearsay evidence is unobjectionable, even where the court is discharging the function of a jury. Thus, in order to show that reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries.¹

The general doctrine is illustrated in *Spargo v. Brown*.² That was an action for excessive distress; and the question was, whether the plaintiff was tenant to the defendant Hugh Brown, or to his brother John Brown. The plaintiff had paid rent to John; but the defendant, to show that the money had been paid to John as his (the defendant's) agent, offered in evidence accounts tendered to him by John Brown, in which John described himself as the agent of the defendant. It was objected that John Brown, not being dead, ought to have been called as a witness. The judge rejected the evidence on this ground, and the court above upheld his ruling. Littledale, J., said:—"The general rule is, that where a person is living, and can be called as a witness, his declaration, made at another time, cannot be received in evidence:" and Bayley, J.:—"The general rule is, that every material fact must be proved on oath. There is an exception to that rule, viz., that the declarations of a party to the record, or of one identified in interest with him, are as against such party, admissible in evidence. But, generally speaking, mere declarations not upon oath are not evidence. The acts of a party may be evidence. But here the defendant merely produced a paper in the handwriting of John Brown, without showing that he was identified with the plaintiff."

But the rule that hearsay evidence is inadmissible is subject to many exceptions, which will be treated consecutively in the present and subsequent chapters.

¹ *R. v. Braintree*. 28 L. J. 1, M. C.

² 9 B. & C. 935.

1. Although hearsay evidence is not received as direct evidence, yet it may be admitted in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions.¹ And what a dead witness has sworn on a former trial, between the same parties, is evidence in the cause, and may be either read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it.² But generally evidence of the declaration of a man since dead, as to a fact done by himself, is not admissible.³ But when a will is disputed on the ground of fraud, the declarations of the testator are admissible.⁴

In *Wright v. Doe dem. Tatham*,⁵ the judges in the Exchequer Chamber held, in an issue of *devisavit vel non*, that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of sanity. The court held that the letters were not receivable as mere declarations of deceased witnesses, or as proof of treatment; but, assuming that the letters were connected with any act of the testator relating to them by which intelligence was indicated, they were receivable. Parke, B., said:—"The question is, whether the contents of these letters are evidence of the fact to be proved upon the issue; that is, the actual existence of the qualities which the testator is in those letters, by implication, stated to possess; and these letters may be considered, in this respect, to be on the same footing as if they had contained a direct positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with the addition,

¹ *Holliday v. Swesting*, Bull. N. P. 294.

² *Doncaster (Mayor of) v. Day*, 3 Taunt. 262.

³ *Garnous v. Barnard*, 1 Anst. 298.

⁴ *Doe d. Ellis v. Hardy*, 1 M. & Rob. 825.

⁵ 7 Ad. & Ell. 313.

that they have acted upon the statements on the faith of their being true, by thus sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statement is perfectly plain, for it is clear that if the same statements had been made by parol or in writing to a third person it would have been insufficient. Yet in both cases there has been an acting on the belief of the truth, by making the statements, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator?"

2. Hearsay evidence is admitted in many cases where it can be regarded as essentially connected with the *res gestæ*, or gist of the matter in issue. Thus, in false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had therefore been dishonoured on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what the drawee had said at the time of the refusal. The question was objected to, but the court held that the evidence ought not to be excluded. There were peculiar circumstances in the case, but Tindal, C. J., said:—"Even if the inquiry before us had depended on the determination of the point, whether evidence by the defendant of the dishonour of the bill, and of the circumstances attending such dishonour, was relevant to the question then before the jury, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy."¹

On this principle, namely, that words are acts, of which evidence may be given as of all circumstances relevant to the issue, proof has been received of the language uttered by the holders of seditious meetings,

¹ *Perkins v. Vaughan*, 4 M. & G. 988.

in order to show the objects and character of such meetings. In the same way evidence may be given of the inscriptions on flags used at such meetings without producing the flags themselves; for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings.¹ Thus, a foreign proclamation, contained in a printed placard, is treated as an inscription or act done, and may be proved by oral evidence or an examined copy. In such a case Pollock, C. B., said:—"Hearsay evidence is admissible when it is part of a transaction ; and in this way the exclamations of a crowd may be received as evidence. But there is, generally speaking, this distinction between what is said and what is done : in order to admit the former it is necessary that the authority of the speaker should be shown, in order to affect the parties; but if it be something done that is to be proved, no authority is required, because there is no danger of being misled; and I regard a placard or proclamation on a wall rather as something done. In a case before me at Guildford, where the plaintiff sought to recover the expenses of an election, I would not allow orders given by third parties by word of mouth to be admitted in evidence against the defendant, but I admitted inscriptions on coaches."²

To prove an act of bankruptcy by the bankrupt beginning to keep his house, it is allowable to prove that the bankrupt was denied to his creditors by a servant at his house ; but it is not enough to prove that the bankrupt directed that he should be denied, unless the direction be followed up by an actual denial.³ And in trover, by the assignees of a bankrupt, for goods, the property of the bankrupt, letters written by

¹ *R. v. Hunt*, 3 B. & Ald. 574.

² *Bruce v. Nicolupolo*, 3 W. R. 483.

³ Lord Tenterden: *Fisher v. Boucher*, 10 B. & C. 710.

him during his absence from home, stating that he was absent to avoid two writs that were out against him, are admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors. It was held in the same case, also, that in order to make a declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and the act should be contemporaneous.¹

In the above case Lord Denman concurred in a previous decision of Parke, B., "that it is impossible to tie down to time the rule as to the declarations," that may be made part of the *res gestæ* in cases of bankruptcy; and his Lordship added, "that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." But a more stringent rule seems to be followed in criminal cases. Thus, in cases of rape, it has been the practice of modern judges to reject the evidence of the statements of a deceased or absent prosecutrix, although made at or immediately after the commission of the crime.² But in a case of manslaughter, several of the judges concurred in admitting the evidence of a witness as to a statement made by the deceased, in the absence of the prisoner, shortly after the accident through which the death ensued. Gurney, B., said:—"What the deceased said at the instant, as to the cause of the accident is clearly admissible."³ The distinction in all these cases lies in the consideration what is and what is not part of the original *res gestæ*. If the words are the natural accompaniment and consequence of the act, they may be stated; but where the connection is remote they will be rejected. It will be observed, that the question of admissibility here

¹ *Rouch v. Great Western Railway*, 1 Q. B. 51.

² *R. v. Megson and others*, 9 C. & P. 420. *R. v. Gutteridge*, ib. 471.

³ *R. v. Foster*, 6 C. & P. 325.

is very different from the case of dying declarations, which will be considered subsequently.

Although it is a rule at common law, that a parent cannot bastardize his issue; yet in a late case, on an issue as to the legitimacy of the plaintiff, a witness was allowed to state the declaration and conduct of the deceased mother, when questioned about her child's parentage.¹

In *Aveson v. Lord Kinnaird*,² the action was on a policy of insurance, secured on the life of the plaintiff's wife; and the defendants offered evidence that, a few days after it was made, the deceased, who had previously represented herself to the defendants as being in good health, had given a totally different account of her health to a witness. It was held that the witness might relate her conversation with the deceased; and that the statements of the latter, as so related, are evidence in the same way as the answers of patients to the inquiries of their medical attendants are evidence as to their state of health.

In actions for adultery, what the husband and wife had said to each other, or letters written by either party to the other, when there was no ground to suspect collusion, were admissible evidence to show the terms on which they lived:³ and the same rule applies presumably to suits under the new law of divorce.⁴

Hearsay evidence, or general reputation, is always received as evidence of character. And in trespass for destroying a picture, when the plea was not guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and that he had therefore destroyed it, Lord Ellenborough held, "that the declarations of the spectators while they looked at

¹ *Hargrave v. Hargrave*, 2 C. & K. 701. Sup. p. 83.

² 6 East, 188.

³ *Trelawney v. Coleman*, 1 B. & Ald. 90.

⁴ 20 & 21 Vict. c. 85.

the picture in the exhibition-room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law." ¹ So under a devise of lands in a certain parish evidence is admissible that a part not comprised in the parish was reported to be in it, and was intended to be included in the devise. ²

Where either of the parties to the record appears to be merely a trustee for a third party, his declaration or admissions may yet be given in evidence to defeat the claim of such third party. ³ So, in an action against a sheriff for a false return, the statements of his deputy to the plaintiff's attorney, as to the cause of the omission to make an arrest, have been held to be evidence against the defendant. ⁴

Where several persons are proved to be engaged in one general conspiracy, all the transactions of that conspiracy by the different parties may and ought to be given in evidence; and it is enough if the party accused can be proved to be privy to the general conspiracy; for if that is proved, everything that is done by the different parties concerned in it must also be imputed to him as a part of the conspiracy. ⁵ Thus, in Hardy's trial for high treason, letters written by one conspirator to another, were held to be evidence against the prisoner after his complicity had been established. So, if several defendants in trespass be proved to be co-trespassers by other competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object. ⁶

The same rule holds in cases of partnership and

¹ *Du Bost v. Beresford*, 2 Camp. 511.

² *Anstee v. Nelms*, 26 L. J. 5, Ex.

³ *Bauerman v. Radenius*, 7 T. R. 663; 2 Sm. L. C. 227.

⁴ *North v. Miles*, 1 Camp. 389.

⁵ Eyre, C. J., *Hardy's Trial*, 24 How. St. Tr. 451.

⁶ Lord Ellenborough: *R. v. Hardwicke*, 11 East, 578.

agency, that the acts or parol arrangements of a partner or agent, made in the ordinary course of business, bind a co-partner or principal respectively, and may therefore be given in evidence for or against them.¹

¹ *Sandilands v. Marsh*, 2 B. & Ald. 673 ; *Doe d. Graham v. Hawkins*, 2 Q. B. 212.

CHAPTER IX.

ON HEARSAY IN MATTERS OF PUBLIC AND GENERAL INTEREST.

WHEN an issue involves a question of public or general interest, the rule that hearsay evidence is inadmissible does not apply : and generally—

In matters of public or general interest, popular reputation or opinion, or the declarations of deceased witnesses of competent knowledge, if made *ante litem motam* (i. e. before the litigated point has become the subject of controversy), and without reasonable suspicion of undue partiality or collusion, will be received as competent and credible evidence.

The ground for its reception lies in the supposition that the universality and notoriety of the interests concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concern. Accordingly, it is always rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest.

In *Wright v. Doe dem. Tatham*,¹ Coltman, J., said: —“The true line (says Buller, J., in *R. v. Eriswell*), for courts to adhere to, is that wherever evidence not

¹ 7 A. & E. 360.

on oath has been repeatedly received and sanctioned by judicial determination, it shall be allowed ; but beyond that, the rule that no evidence shall be admitted, but what is on oath, shall be observed. . . . Evidence of opinion is admitted in some cases without oath, as for instance where reputation is given in evidence to prove a public right. . . . The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject ; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected ; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons." And in the same case in the Exchequer Chamber,¹ Alderson, B., said :—"The general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true ; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary."

In ejectment by the lessor of a plaintiff in tail, against the devisee in fee of a previous remainder-man, the question was, whether the land in dispute was part of the estate which had been originally devised by a testator between fifty and sixty years previously. Evidence of reputation had been received that the land had been purchased by the original testator ; but it was held clear by the court above, notwithstanding some special circumstances in the case, that the question was merely one of private ownership, and that the evidence should have been rejected.²

In *Weeks v. Sparke*,³ to trespass to the plaintiff's close, the defendant pleaded a prescriptive right of

¹ 4 Bing. N. C. 528.

² *Doe d. Didsbury v. Thomas*, 14 East, 323.

³ 1 M. & S. 679.

common for his cattle, and the plaintiff replied, traversing the plea, and prescribing for a right to use the *locus in quo* for growing corn until harvest time. It was held that witnesses might prove the statement of a deceased neighbour as to the nature of the enjoyment of the respective rights; but that a foundation for its reception must first be laid by proof of the actual enjoyment of the rights. Le Blanc, J., said :—
“ How is the right to be proved? First, it is to be proved by acts of enjoyment within the period of living memory. And when this foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons (not any old persons, but persons who have been conversant with the neighbourhood where the waste lies, over which the particular right of common is claimed) of what they have heard other persons, of the same neighbourhood, who are deceased, say respecting the right. Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned, as well as the person claiming it; because a right of common is, to a certain extent, a public right. And the only evidence of reputation which was received was that from persons connected with the district. In the same manner in questions of pedigree, although they are not of a public nature, the evidence of what persons connected with the family have been heard to say, is received as to the state of that family. In like manner also upon questions of boundary, though the evidence of perambulations may be considered to a certain degree as evidence of an exercise of the right, yet it has been usual to go further, and admit the evidence of what old persons who are deceased have been heard to say on those occasions. The rule generally adopted, upon questions either of prescription or custom, is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who

were in a situation to know what those rights were, have been heard to say concerning them."

There was formerly considerable conflict of opinion among the judges, as to the admissibility of reputation, and the declarations of deceased persons to prove or disprove a claim of prescriptive right. In *Morewood v. Wood*,¹ where to trespass the defendant pleaded a prescriptive right, Lord Kenyon and Ashurst, J., held the question to be one of a public nature, and that evidence of reputation should therefore be rejected. But Buller, J., and Grose, J., appear to have thought the issue to be sufficiently of a public nature to let in the evidence. So traditionary reputation has been received as evidence of the boundaries between two parishes and two manors; but not of the boundaries between two estates.²

In *Reg. v. Sutton*,³ the defendant was indicted for the non-repair of a bridge; and, to disprove her liability, offered a presentment of a jury in the reign of Edward III., by which it was found that they did not know who was liable to repair; and this was held to be evidence of reputation for the defendant.

Reputation has been received in support of an immemorial right of common, *pur cause de vicinage* so pleaded.⁴ In *The Duke of Newcastle v. Hundred of Broxtowe*,⁵ the question was, whether Nottingham Castle was within the hundred; and it was held that orders made at the County Sessions between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred was given from Domesday-Book and an old charter of Henry VI., the

¹ 14 East, 329, n.

² 14 East, 331.

³ 8 Ad. & El. 516.

⁴ *Prichard v. Powell*, 10 Q. B. 589.

⁵ 4 B. & Ad. 273.

judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question was as to the rights of the county of the city of Chester ; as between that city and the County Palatine of Chester ; a decree by a Lord Treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation.¹ So an extra-judicial report by a government surveyor, appointed by Queen Elizabeth, as to the boundaries of a manor, has been rejected as evidence of such boundaries. "The surveyor," said Lord Denman, "does not appear to have had any authority to institute the inquiry ; and, stripped of his authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compelled, possibly, by some interested person in furtherance of a sinister object of his own."² And an old survey of landed property, taken under the directions of a former proprietor, is no evidence that he was entitled to it.³

In a case⁴ in the Exchequer Chamber, on a question in replevin whether goods were taken in Norfolk or Suffolk, a map of Suffolk purporting to have been republished in 1766, *with corrections and additions*, by the sons of J. K., from a map published in 1736 by J. K., who then took an accurate survey of the whole country, was tendered to show that the *locus in quo* was not in Suffolk. It was produced by a magistrate of both Norfolk and Suffolk, who had purchased it twelve or fourteen years previously, and before any dispute as to the boundaries had arisen. The court

¹ *Rogers v. Wood*, 2 B. & Ad. 245.

² *Evans v. Taylor*, 7 B. & A. 617 ; S. C. 3 N. & P. 174.

³ *Daniel v. Wilkins*, 21 L. J. 236, Ex.

⁴ *Hammond v. Broadstreet*, 23 L. J. 332, Ex.

rejected the evidence chiefly on the ground that the new editors did not appear to have had any personal knowledge of the subject, nor to be in any way connected with the district, so as to make it probable that they had such knowledge.

This case illustrates the important principle that, before ancient documents can be received as evidence of reputation, it must be proved that they have come from the custody of a person who is presumptively connected sufficiently by knowledge with the matter in dispute, so as to render him an authority. They must also bear the plain marks of authenticity. Thus, in the above case it was held, that the fact of the map being in the possession of a county magistrate did not vouch for its accuracy; and that it was unlike the case of a deed of conveyance found in the custody of a party, who, if it were genuine, would be entitled to it. The hearsay, especially where it is documentary, must contain a clear and unambiguous declaration concerning the disputed issue. Thus, in a late case, to prove a public right of way over a manor, a map of the manor, which had been made by a deceased steward of the manor, was given in evidence. The map showed lines made by the deceased witness which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed on the manor. If the way had been an occupation way it would have been of a private nature, and it was admitted could not be proved by the evidence which had been given; and as there was nothing on the face of the map to show that it was a public way, and the map had been used only to settle the boundaries of the copyholds of the manor, it was held to be inadmissible.¹

The conversations of former tenants of a manor, and of other persons interested in it, appear to have

¹ *Pipe v. Pulcher*, 28 L. J. 12, Q. B.

been held good evidence as to the boundaries of the manor.¹ But a survey of a manor belonging to Oliver Cromwell, and taken by commissioners appointed by him, containing also a presentment by a jury that certain dues were payable to the lord, was held inadmissible as a public document, or as reputation to prove such dues.² And the case of *Weeks v. Sparke*,³ and the whole doctrine by which personal prescriptive rights have been identified in a great measure with public and general rights, have been much shaken by a late case in the Exchequer Chamber.⁴ There the question in trespass was, as to the property in a plot of ground which lay between the waste of the plaintiff and the estate of the defendant. The plaintiff offered evidence of statements made before any controversy arose, by his deceased tenants, who as such had exercised commonable rights over the waste adjoining the *locus in quo*; and other statements made by deceased persons, who, although not tenants, were resident in the manor, and well acquainted with it. No evidence was given of an actual enjoyment of the right on the close by the tenants. Parke, B., said:—"If the question had been one in which all the inhabitants of the manor, or all the tenants of it or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs: and if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been

¹ *Doe d. Molesworth v. Leeman*, 15 L. J. 338, Q. B.

² *Duke of Beaufort v. Smith*, 19 L. J. 97, Ex.

³ *Supra*, p. 95.

⁴ *Earl of Dunraven v. Llewellyn*, 19 L. J. 388, Q. B.

admissible. But, although there are some books which state that 'common appendant' is of 'common right;' and that 'common appendant' is the 'common law right of every free tenant of the lord's wastes,' . . . it is not to be understood that every tenant of a manor has by the common law such a right, but only that certain tenants have such a right, not by prescription, but as a right by common law incident to the grant. . . . This right, therefore, is not a common right of all tenants, but belongs only to each grantee (before the statute of *quia emptores*) of arable land by virtue of his individual grant, and is an incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant or prescription. . . . We are therefore of opinion that the case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes; and reputation is not admissible in the case of such separate right, each being private, and depending on each separate prescription, unless the proposition can be supported, that, because there are many such rights, the rights have a public character, and the evidence, therefore, becomes admissible. We think this position cannot be maintained. . . . We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription; and the number of these private rights does not make them to be of a public nature."

On an issue whether or not certain land, in a district repairing its own roads, was a common highway, it has been held admissible, but slight, evidence that, before the point was litigated, the inhabitants held a public meeting to consider the repair of the way, and that several of them, since dead, signed a paper on the occasion, stating that the land was not

a public highway.¹ So the verdict or presentment of a jury summoned by a court of competent jurisdiction to determine the boundaries of two manors is admissible evidence of reputation, in an issue as to the boundary of a third manor, which is conterminous with one of the former.² Some of the remarks of the learned judges, in this last case, may appear to be at variance with the later case of the *Earl of Dunraven v. Llewellyn*. Thus, Coleridge, J., states: "On the question of boundary, between two owners, no doubt reputation is admissible." But this observation must be limited by the circumstances of the case, which seem to have been regarded as converting an apparently personal question into one of a public nature. An award, being in the nature of a private transaction, is not evidence of reputation.³

The general doctrine was discussed elaborately in the case of *Reg. v. Inhabitants of Bedfordshire*.⁴ There, on an indictment against a county for not repairing a public bridge, the defendants pleaded that A. was liable to repair a portion, *ratione tenuræ* of the manor of O.; G. a certain other portion, *ratione tenuræ* of the manor of H.; and T. the residue, *ratione tenuræ* of the manor of C. Evidence of reputation was tendered by the defendants to show that, by immemorial custom, the respective parties mentioned in this plea had repaired the respective portions. The evidence was rejected at the trial, apparently on the ground that the interests were of a private nature; but the court held that the evidence ought to have been received. Lord Campbell, C. J., after recognising the general principle, "that public reports ought not to be held admissible so as to affect the rights of private persons," proceeded to say:

¹ *Barraclough v. Johnson*, 8 Ad. & El. 99.

² *Brisco v. Lomax*, 8 Ad. & El. 198.

³ *Evans v. Rees*, 10 A. & E. 151; *Lady Wenman v. Mackenzie*, 25 L. J. 44, Q. B.

⁴ 24 L. T. 268, Q. B.; 24 L. J. 81, Q. B.

—“Upon the question here raised, all the inhabitants of the county who have property liable to be assessed to the county rate, have an interest whether this bridge was to be repaired in part by the owners of certain lands, *ratione tenuræ*; such persons would be affected by the verdict of the jury; and then there are others whom it would also affect, viz., those who require the use of the bridge, and to them it is of importance upon whom the liability rests to repair the bridge. If a prosecution arises, heavy expenses are sure to be incurred, and therefore such questions are certain to be discussed, and a true reputation is very likely to exist. . . . Certainly, the question objected to in this case touches the rights of individuals; but then it also affects that of the county and the rate-payers. For these reasons, we think that evidence of reputation was improperly rejected.”

In questions concerning the admissibility of reputation, distinctions have been drawn between cases in which a public interest, and others in which merely a general or local interest, is concerned. But reputation appears to be equally receivable in both instances, although its value will depend essentially on the vicinity of the witness to the *locus in quo*, and his personal knowledge of the surrounding circumstances.

“In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood.”¹

The next important restriction on the rule under consideration, is contained in the principle that—

The declarations of deceased persons are not admissible as reputation, unless they have been made *ante litem motam*, i. e., before the issue has

¹ Parke, B.: *Crease v. Barrett*, 1 C. M. & R. 929.

become, or appeared likely to become, a subject of judicial controversy.

In *R. v. Cotton*,¹ Dampier, J., said:—"The reason why the declarations of deceased persons [are admitted] upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause or mislead posterity. But the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice, or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding, than conduce to the elucidation of the truth. It has, therefore, been wisely decided, that evidence of reputation arising *post litem motam* shall not be admitted."

Thus, the presentment of a homage, sworn to determine boundaries, has been rejected, because they had no jurisdiction, and because it amounted to a declaration *post litem motam*.² But in an action by a copyholder against his lord, where the question was as to the amount of fine payable to the latter, the incidental depositions of witnesses in an action by a former claimant against a former lord, have been admitted as evidence for the lord, as depositions of persons called on behalf of a person standing in *pari jure* with the plaintiff, and because the same custom was not in controversy.³

It seems to be settled that, the *lis mota* dates, not from the commencement of an action or suit; nor even from the commencement of actual litigation; but from the time when the question began to attract public

¹ 3 Camp. 446.

² *Basset v. Richards*, 10 B. & C. 657.

³ *Freeman v. Phillipps*, 4 M. & S. 497.

attention as a controversy. "The line of distinction is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness."¹

¹ Per Mansfield, C. J., 4 Camp 417.

CHAPTER X.

ON EVIDENCE OF ANCIENT POSSESSION.

ALTHOUGH, as has been stated in the preceding chapter, hearsay evidence is not generally admissible in questions concerning merely private and personal rights, yet it is received, in some cases, where a controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. But in such cases the surrounding circumstances must be free from reasonable suspicion ; and it must appear that the deeds or other documents, in which the hearsay is contained, are ancient, *i. e.*, more than thirty years old ; that they come from the custody in which they would presumably be found, if authentic ; and that they have been regarded and treated as authentic by the guardians of them. It is therefore a rule that—

Ancient documents purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred,¹ provided they be produced from proper custody.

In *Roe d. Brune v. Rawlings*,² a paper was received which purported to be a statement by a confidential agent, to a former tenant for life, of rent reserved in

¹ Tayl. 436 ; 1 Phill. 234.

² 7 East, 279.

1728, and as such had been indorsed by the latter. This was held to be evidence of the fact, for the plaintiff, a tenant in tail, in 1806, to whom it had been handed down with other muniments of title, to show that the rent reserved by a tenant for life, who had immediately preceded the plaintiff, was less than the rent originally reserved. Lord Ellenborough said:—“Ancient deeds, proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, ‘that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.’ This paper, therefore, having been found amongst the muniments of the family. . . accredited . . . and preserved . . . we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date.”

Thus, the counterparts of old leases from the repository of the lord of a manor have been received in evidence of the demise of premises, even without proof of enjoyment.¹ In that case, tried in 1782, several leases, dated between 1680 and 1702, were received as undoubtedly ancient; but a lease dated in 1730 was rejected as too recent. So, to prove a personal prescriptive right of fishery, as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, are admissible.² And old rent rolls or court rolls are received to prove rights to which they refer.³

So, in ejectment, where both plaintiff and defendant claimed through E., it was held that an ancient entry made by E.’s steward in his rent-book, was evidence as to the identity of the property.⁴ So, ancient

¹ *Clarkson v. Woodhouse*, 3 Doug. 189; S. C., 5 T. R. 412, n.

² *Rogers v. Allen*, 1 Camp. 309.

³ 1 Phill. 235.

⁴ *Doe dem. Strode v. Seaton*, 2 Ad. & El. 171.

terriers are received to prove the amount of vicarial tithes.¹

In *The Bishop of Meath v. Marquis of Winchester*,² in the House of Lords, the general doctrine, more particularly as regards the next point to be considered, viz., the custody of the document, was fully considered. The main questions were, whether an ancient deed, and also a case concerning the right of presentation to a living, prepared for counsel by a former Bishop of Meath, in 1695, and found among the family papers of his descendants, were evidence touching the right of presentation as against the plaintiff in error. Both documents were held clearly admissible.

Ancient documents, to be receivable as such, must be proved to have come from the custody in which it was reasonable that they should be found.

Thus, in the above case, Tindal, C. J., said :—
“ The result of the evidence, upon the bill of exceptions, we think is this—that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it ; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity ; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found ; for it is obvious that whilst there can be only one place of deposit, strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in

¹ *Pearson v. Beck*, 22 L. J. 213, Ex.

² 3 Bing. N. C. 183.

degree ; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury ; a manuscript found in the Bodleian Library, Oxford ; an old grant to a priory brought from the Cottonian MSS. in the British Museum ; were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand an old chartulary of the dissolved abbey of Glastonbury was held to be admissible because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord Redesdale observed, would have been the Augmentation Office ; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest ; but it was, as the court argued, a place of custody where it might be reasonably expected to be found. So also, in the case of *Jones v. Waller*, the collector's book would have been as well authenticated if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. Upon this principle, we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop Dopping, and found in the place and in the custody before described, was admissible in evidence. It was a document which related to the private interests of the

bishop, at the time it was stated, for it bears date in 1695, about which time, it appears from other facts found, that Barry, the late incumbent, was dead, and that before 1697, Bishop Dopping collated his own son. It related, therefore, to a real transaction which took place at the time; and although it might be said to have related in some degree to the see, for the right of collation was claimed, as of an advowson granted to the see; yet it is manifest this case had been stated with reference to the private interests of the bishop in the particular avoidance, and that it was more reasonable to expect it to be preserved with his private papers, and family documents, than in the public registry of the diocese. But even considered as a document belonging to the see, it was not unreasonable that it should have been found in the bishop's mansion house; for, upon the evidence, there is only one single ecclesiastical record preserved in the registry of the diocese of Meath, of an earlier date than 1717; and on the other hand, the case and grant are found in the same parcel with several papers relating to the see of Meath, and in the same room were several visitation books of the diocese and other papers relating to the see."

It appears from this case, that it is not necessary that the custody should be that which is strictly proper: it is sufficient if it be one which may be reasonably and naturally explained.¹ But it is not sufficient to produce the documents without calling a witness to prove the custody from which they come.²

It is laid down by Mr. Phillipps,³ as a condition annexed to this class of evidence, that some act, *e.g.*, of recognition or enjoyment, done with reference to the documents, is required to be shown if the nature of the case permits it; but he admits that, where this cannot be done from the antiquity of the document, it

¹ *Doe d. Neale v. Sampter*, 8 Ad. & El. 154.

² *Evans v. Rees*, 10 Ad. & El. 154.

³ 1 Phill. 236; *contra*, Tayl. 435.

will be admissible without such proof. It appears doubtful whether this qualification will hold even in this restricted form, and it is denied by Mr. Taylor. A late authority rather confirms the latter view—*Doe d. Egremont v. Pulman*,¹ where, in ejectment to prove that an ancient ancestor had been seised of the *locus in quo*, the lessor of the plaintiff produced from her muniment room the counterpart of an old lease, purporting to be granted by the ancestor, but executed only by the lessee. It was held admissible, without proof that the lessee had actually enjoyed under it.

It is said to be an established principle, that nothing said or done by a person having at the time an interest in the subject-matter, shall be evidence either for him or persons claiming under him;² and, therefore, in a settlement case,³ an old entry in a parochial book was held not to be evidence of the terms under which a pauper resided in the parish. So, entries made by a deceased person, through whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not evidence of title for the defendant.⁴

¹ 3 Q. B. 623.

² Abbott, C. J.: *R. v. Debenham*, 2 B. & Ald. 185.

³ *Ibid.*

⁴ *Outram v. Morewood*, 5 T. R. 123.

CHAPTER XI.

ON EVIDENCE IN QUESTIONS OF PEDIGREE.

IN questions of pedigree, or inquiries concerning relationship or descent, the rule by which hearsay evidence has been excluded is waived, and it is held that—

The statements of deceased persons, who were connected by blood or marriage, to the family in question, are admissible in cases of disputed pedigree.¹

In *Davies v. Lowndes*,² Parke, B. said :—“ There seems to be no limitation in the rule as to blood relations ; but with regard to relationship by affinity, it is different: it seems to be confined to declarations by a husband as to his wife’s relations. It is for the judge to decide, as a question precedent to the admission of the evidence, whether the declarant has been sufficiently proved to have been connected by consanguinity or affinity to the family in question; and it makes no difference that the legitimacy of the declarant happens to be also the only question in issue.”³

It is held that the declarations must have been from persons having such a connection with the family that it is natural and likely, from their domestic habits, that

¹ Tayl. 414.

² 7 Scott N. R. 188.

³ *Doe d. Jenkins v. Davies*, 16 L. J. 218, Q. R.

they were speaking the truth, and could not be mistaken.¹ The declaration of others than blood relations, and husbands and wives, are not admissible; thus, the declarations of deceased servants and intimate acquaintances are rejected;² even though coming under the head of dying declarations.³ Nor are the declarations of illegitimate relations received.⁴

“The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relative or next-of-kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which perhaps he could not tell if asked. But it is evidence, from the interest of the person in knowing the connections of the family; therefore, the opinion of the neighbourhood of what passed among acquaintances will not do.”⁵ In this case it was held clear that the declarations by a deceased husband as to his wife’s legitimacy are admissible, as well as those of her blood relations. Accordingly, in *Doe d. Fuller v. Randall*,⁶ it was held that the declaration of a deceased woman of statements made by her former husband, that his estate would go to J. F., and then to J. F.’s heir, were admissible to show the relationship of the lessor of the plaintiff to J. F. There Best, C.J., said:—“Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is to become a member, than a relation who is only distantly

¹ *Whitelocke v. Baker*, 13 Ves. jun. 511.

² *Johnson v. Lawson*, 9 Moore, 183.

³ *Doe d. Sutton v. Ridgway*, 4 B. & Ald. 53.

⁴ *Doe v. Barton*, 2 M. & R. 28.

⁵ Lord Erskine: *Vowles v. Young*, 13 Ves. 147.

⁶ 2 M. & P. 20.

connected by blood ; as, by frequent conversations, the former may hear the particulars and characters of branches of the family long since dead. . . . The declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiassed opinion."

It has been said by a learned judge, on the authority of an old case : "Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, &c., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation, beyond the sea dead ; and the common reputation and belief of it in the family gives credit to such evidence."¹ Hence arises the doctrine, that the declaration need not be one which has been made immediately by the deceased, as of his own knowledge or belief, to the witness ; but it may be, as a learned judge has expressed it, "two deep," or indefinitely more remote in degree. It is sufficient to show that a general belief has prevailed in a family. Thus, evidence that a person went abroad when a young man, and, according to the repute of the family, had afterwards died in the West Indies, and that the family had never heard of his being married, is strictly admissible to show that he died unmarried.²

On this ground, not merely oral declarations of deceased persons connected with the family, but old family documents, genealogies, inscriptions on tombstones, on walls, or rings, if sufficiently authenticated as genuine, and as having been recognised as such by the family, will be received. This second and extended branch of the rule has been argued so recently and

¹ Bull. N. P. 294, cited in note 15 East, 294.

² *Doe d. Banning v. Griffin*, 1 East, 293.

elaborately in the leading case of *Davies v. Lowndes*, in error,¹ from the Common Pleas, that a full extract from Lord Denman's judgment will be the best commentary on it.

On the trial of a writ of right, a paper, purporting to be an old genealogy, was offered as evidence of pedigree. His lordship said :—"The document in question was intituled, 'the Genealogie of the Lloyds of Cwm Gloyne, county of Pembroke, showing their descent from the princes of Wales, together with some collateral branches of the same family.' The pedigree was traced from The Lord of Rhys, prince of South Wales, who died 1233, to a William Lloyd of Treveggin, living in 1733. It stated in one of the accounts of one of the collateral branches, the marriage of the sister of William Lloyd's grandfather to a Thomas Selby, from whom the demandant alleged that Thomas James Selby the testator was descended ; and it also stated that Erasmus Lloyd was his cousin, and the marriage of the daughter of his great grandfather's brother with a person of the name of Ellis ; and, as evidence of both these facts, it was material to the demandant's case. At the foot of it was a memorandum in these words :—"Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, anno domini 1733, by his loving kinsman, William Lloyd.' This signature was proved to correspond with that to the will of William Lloyd, one of the ancestors of the demandant named in the count. On the back of the document was an indorsement in these words :—"A true account of my family and origin, Thomas Lloyd, Cwm Gloyne ;' and it was proved by a living witness that this document was found by him fifty years ago amongst the

¹ 6 M. & G. 471.

papers of the Cwm Gloyne family in a drawer in the mansion house of the Cwm Gloyne estate, which had devolved upon him ; and the witness proved the indorsement to be in the handwriting of Thomas Lloyd, of Cwm Gloyne. The document was insisted upon by the counsel for the demandant as being altogether admissible. The court rejected it. It was then offered as admissible in part, viz., as evidence of the first collateral branch, and rejected ; then as evidence to prove who the grandfather of William Lloyd was, and rejected ; then as evidence to show who the father of William Lloyd was, but the counsel for the tenant admitting that fact, that portion of the document was also rejected. Then it was contended that the portion which stated who the paternal uncles and first cousins of William Lloyd were, was admissible ; it was rejected. Then the demandant's counsel tendered those parts which showed that William Lloyd's uncle John died a bachelor, and that his uncle George had certain children then living ; these also were rejected. Then, lastly, he offered such part as showed a marriage of Henry Lloyd's sister with Ellis, and the court rejected that also, holding no part to be legally admissible ; and the question is, whether that decision was right. It appears to us that it was not. It does not admit of any doubt that this pedigree, if it had been signed by William Lloyd, with the date of 1733, and without any memorandum of his, and had borne the memorandum indorsed by Thomas, would have been altogether admissible. The signature of William Lloyd, one of the family of the demandant, would have been equivalent to a declaration of the relationship of the persons therein mentioned, including the marriage of a Selby with a Lloyd, and would have been evidence to connect the family of the demandant with that of the tenant. The signature of Thomas Lloyd, of Cwm Gloyne, would have amounted to a similar recognition by another member of the same family. But it is argued that the memorandum of William Lloyd places this pedigree upon a different

footing, and renders it altogether inadmissible. If this were so, there would still be a question what the meaning of Thomas Lloyd's indorsement, coupled with the fact of its preservation by him, was. If the words, 'A true account of my family and origin,' were written on the back of the document, merely as denoting what its contents were—a sort of index to it; the indorsement would not render it admissible on the footing of its being equivalent to a declaration by Thomas. If the words intended to convey, that the writer had satisfied himself of the correctness of William's statement, from independent sources of information—that is, from his own knowledge of the tradition prevailing in his own branch of the family, then the whole pedigree would have been admissible as a declaration by one of the family of Cwm Gloyne. There is some evidence of such a recognition to go to the jury for their consideration; and this would be a ground for a *venire de novo*. But passing by that objection, and adverting to the memorandum of William only, the question is, whether that memorandum destroys the effect of his recognition, and renders it wholly inadmissible in evidence, as the Lord Chief Justice and the Judges of Common Pleas have decided. The ground of that decision appears to have been, that the memorandum bore upon the face of it a sort of certificate that the statement in the pedigree was merely secondary evidence of existing originals, from which it was compiled, and that the absence of those originals was not accounted for; and that if any part of the pedigree was derived from legitimate sources, personal knowledge, or family tradition, it did not appear distinctly which was such part, and therefore the whole was inadmissible. We think this view of the case is not correct. A pedigree, whether in the shape of a genealogical tree, or map, or contained in a book, or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is

this admitted? It may be because the simple act of recognition of the document, and consequent acknowledgment of the relationship, stated in it by a member of the family, is some evidence of that relationship from whatever sources his information may have been derived, because he was likely from his situation both to inquire into the truth of such matters, and from his means of knowledge to ascertain it. If this be a correct view of law, the pedigree in question was admissible, because it was certainly acknowledged by W. Lloyd to be correct. But the reason why a pedigree, when made or recognised by a member of the family, is admissible, may be that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations; or of information received by him from some deceased members, of what the latter knew or heard from other members who lived before his time. And if so, it may well be contended that if the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also, if there be some, but an uncertain and undefined, part derived from reference to improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from registers, wills, monumental inscriptions, and family records or history; and consequently to that extent the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."

In the *Berkeley Peerage Case*,¹ on an issue as to the legitimacy of the petitioner, three questions referred by the House of Lords to the judges were substantially—

1. Whether the depositions made by A.'s reputed

¹ 4 Camp. 401.

father, in a suit by A. against B. were evidence of pedigree for A., in a suit by A. against C.

2. Whether, in a similar case, entries made by A.'s reputed father in a Bible, that A. was his son, born in wedlock on a certain day, were inadmissible.

3. Whether such entries were inadmissible, if made with the express purpose of establishing A.'s legitimacy in case it should ever be called in question.

The point in the first question involved the question whether hearsay declarations of pedigree, made after a judicial controversy has arisen, are admissible. The point in the second question was, whether an entry in a book made by a deceased relation is evidence; and in the third, whether such an entry, if otherwise admissible, continues to be so when made with an express purpose of providing against a contemplated or impending controversy.

It was held that the evidence in the first case was inadmissible, as having been made after an actual, and not merely a judicial, controversy had arisen; that in the second it was strictly admissible, whether the entry was made in a Bible or any other book, or on any other piece of paper; and that in the third case it was also admissible, but with strong objections to its credibility, on account of the particularity, and perhaps the professed view with which it was made.

The doctrine in this important case has been followed up by the *Sussex Peerage Case*.¹ There an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received not as conclusive proof, but as a declaration made by one of the parties. In the same case, evidence of declarations by a deceased clergyman that he had celebrated the marriage was rejected.

In accordance with the rules recognised in the pre-

¹ 11 Cl. & Fin. 85.

ceding cases, a cancelled will of an ancestor, found among family papers, has been received as a declaration concerning the relations of the family.¹ Pedigrees hung up in family mansions;² a marriage certificate kept by the family;³ a genealogy made by a deceased member of a family, even though purporting to be founded partly on hearsay;⁴ engravings on rings,⁵ coffin-plates, and monumental inscriptions generally, are regarded as admissible, but not always as credible, evidence.⁶

Not only hearsay declarations of deceased relatives, but also proof of the manner in which a person has been brought up and treated by his family, will be evidence. In the *Berkeley Peerage Case*, Mansfield, C. J., said:—"If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached; and indeed it amounts to a daily assertion that the son is legitimate."⁷

The term pedigree embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage and death, and the times when, either absolutely or relatively, these events happened. All these facts, therefore, may be proved by hearsay derived from relatives.⁸ But it has been doubted whether specific dates can be so proved; but the preponderance of authority appears to be in favour of permitting them to be so proved.⁹ The written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age;¹⁰ but in a settlement case the declaration of a father as to the place of his

¹ *Doe d. Johnson v. Earl of Pembroke*, 11 East, 504.

² *Goodright v. Moss*, Cowp. 594.

³ *Doe v. Davies*, 10 Q. B. 314.

⁴ *Monkton v. Attorney-General*, 2 Russ. & M. 147.

⁵ *Vowles v. Young*, 13 Ves. 144.

⁶ *Davies v. Lowndes*, 6 M. & G. 527, and sup. 115.

⁷ 4 Camp. 416.

⁸ Tayl. 418.

⁹ *Ib.* 419.

¹⁰ 7 East, 290.

child's birth has been rejected, as not being strictly a question of pedigree.¹ So, an order of removal was quashed, for being founded merely on the pauper's own evidence as to the time and place of her birth; because the statement was held to be one which she could not make of her own knowledge.²

Before the declarations of deceased relations can be received as such, it must be proved *aliunde*, i. e., by extrinsic and independent sources of evidence, that the declarants were related to the family.³ It is superfluous to state that the declarant, if alive, must be called.⁴

The rule which has been mentioned in the preceding chapter, that the hearsay declarations of deceased witnesses to be admissible must have been made *ante litem motam*, is observed generally in cases of pedigree. On this head, it is only necessary to refer to the declaration, which has been already quoted,⁵ of Mansfield, C. J., in the *Berkeley Peerage Case*, that the *lis mota*, or beginning of the litigation, dates from the origin of the controversy, and not from the commencement of the trial. When a question of pedigree has assumed such a degree of conflicting interest, that the declarant must be reasonably presumed to be under the influence of undue partiality or prejudice, the disposition of the courts is either to reject his evidence altogether, or to receive it only with the strict limitations as to credibility which are laid down by the judges in their answer to the third question in the *Berkeley Peerage Case*. In a late case of disputed descent from a lunatic, one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a master in chancery, on an injunction to discover who was entitled by consanguinity to become committee. It was urged that

¹ *R. v. Erith*, 8 East, 539 ; *s. v. Shields v. Boucher*, 1 De Gex & Sm. 40.

² *R. v. Rishworth*, 2 Q. B. 487.

³ Lord Eldon: *Berkeley Peerage Case*. 4 Camp. 419.

⁴ Tayl. 418.

⁵ Sup. p. 105.

the deposition was inadmissible as being made *post litem motam*. But the court held that it was not so.¹

A statement made by a deceased parent that a child was born before marriage, or that no marriage ever took place, is admissible;² but evidence of want of access, or of non-access, in order to bastardize a child, appears to be generally inadmissible on grounds of public policy.³

¹ *Gee v. Good*, 29 L. T. 123.

² *Goodright d. Stevens v. Moss*, Cowp. 591; *Hargrave v. Hargrave*, 2 C. & K. 701.

³ 1 Phill. 202; sup. p. 83.

CHAPTER XII.

ON EVIDENCE OF DYING DECLARATIONS.

THE principle that evidence is inadmissible, unless given on oath, and when the party who is to be affected by it can have the benefit of cross-examination, is limited by another exception in cases of homicide, where the deceased, under the impression of immediate or impending dissolution, has made a statement concerning the person of the assailant, and the circumstances of the attack. It is presumed that the sense of approaching death in the declarant is calculated to produce in him a sentiment of responsibility, equal to that which a religious and conscientious man feels when required to make a statement on oath; and that the obligation to utter nothing but the strict truth is even greater, inasmuch as he knows the hour to be at hand when he must render an account of all his words and acts to the Supreme Being. Accordingly, where either the sense or conviction of approaching death is deficient or uncertain; or where it appears that the declarant had no sufficient belief in a future state, and his religious responsibility for his actions in this life; his dying declarations will not be received. But, even when they are received, their value and credibility will vary infinitely, according to circumstances. In all cases a strong objection to their full credibility arises from the fact, that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements which the

latter may have committed. It often happens, also, that the declaration is made on great pressure, when the declarant is suffering from physical exhaustion or mental alienation; and when he is partially, or even wholly unconscious of the full purport of his declaration. These considerations, combined with the strong objection of the English law to condemn any man on the testimony of an absent, or even a deceased witness, induce courts to regard this species of evidence with great watchfulness and suspicion. The judge, therefore, whose duty it is to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission, will generally exclude it if there appear to be any reasonable doubt as to the veracity, sanity, consciousness, or sense of religious responsibility and impending dissolution in the mind of the declarant at the time of the statement. Subject to these remarks it is held to be a rule that—

In murder, or homicide, the declarations of the deceased, concerning the cause and circumstances of his mortal wound, if made with a full consciousness of approaching death and religious responsibility, are admissible in evidence for or against a prisoner who is charged with the crime.

In *Reg. v. Woodcock*,¹ Eyre, C. J., said:—"The general principle on which this species of evidence is admitted, is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a

¹ Leach C. C. 502.

court of justice." In this case, it was held that a statement made by the deceased to a magistrate, who administered an oath to her extra-judicially, could not be received; but that a statement made by her when her dissolution was fast approaching, and when she must have known the fact, although she said nothing that indicated such a knowledge, was receivable. In this case the judge left it to the jury to say whether the statement was made under the apprehension of death; but the modern practice is for the judge himself to decide this question. It will be observed that, in this case, although the statement was inadmissible as a statement on oath, in a situation where an oath was improperly administered; there was no objection to it on the ground that the statement was made in answer to a formal and solemn inquiry. Accordingly, it is not held to be necessary that the statement should be voluntary or spontaneous; and answers, *in articulo*, to questions put by a surgeon, for the purpose of ascertaining whether he ought to call in a magistrate, have been received.¹

It is stated by Lord Denman,² that "with regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible." To these three conditions a fourth must be added, viz., religious sentiment.³

1. The declaration must be made when the declarant is in actual danger.

This proposition is commonly stated more broadly, that the declaration must be made *in extremis* or *in articulo mortis*.⁴ but there appears to be no definite

¹ *R. v. Fagent*, 7 C. & P. 238.

² 11 Cl. & Fin. 112.

³ *R. v. Pike*, 3 C. & P. 598.

⁴ *R. v. Van Butchell*, 3 C. & P. 631. Per Hullock, B.

limitation of the time, before death, within which the declaration must be made ; and recent cases support the doctrine, that declarations made under apprehension of death, if otherwise admissible, will not be rejected because a considerable time elapses between the declaration and the death. Thus, in *R. v. Mosley*,¹ the declarations were held by all the judges to have been rightly received, although the deceased did not die until eleven days after making them, and although the surgeon held out slight hopes of recovery to him until a few hours before his death. Here, however, the deceased had frequently expressed a belief, prior to the statement, that he should never get better.

2. It appears also that the doctrine laid down by Hullock, B., that "the declarations" are admitted only if "they are made under an impression of almost immediate dissolution," is by no means literally correct. It is true, as stated by Tindal, C. J., in *R. v. Hayward*,² that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, will undoubtedly render the evidence of such declarations inadmissible;" and accordingly it has been held lately,³ that in the absence of expressions or conduct to show that the deceased was under the impression of approaching death, his statements are inadmissible. In this case the deceased had said, he was "a murdered man, and it would have been better if they had killed him on the spot than left him to linger ; and that he thought he should never get over it ;" but he lived several weeks afterwards. The learned judge at first held a statement made at the time of this remark to be admissible; but afterwards rejected it, on its appearing on cross-examination that the deceased had not used the phrase, "murdered man," in its literal sense, and that he did not really

¹ 1 Moo. C. C. 97.

² 6 C. & P. 157.

³ Wightman, J.: *R. v. Quatter*, 6 Cox Crim. Cas. 357.

believe at the time that he was dying. The learned judge said :—" The general principle is, that the deceased must be under the apprehension that he will die ;" but the question, whether the impression in the mind of the deceased must amount to an apprehension of immediate death, was not touched. But in a later case, the same learned judge has stated his opinion more broadly.¹ In that case it appeared that at the time of the statement the deceased was under the full impression that she would die, but there was no evidence to show that the impression amounted to an expectation of immediate dissolution; and it was contended for the prisoner, that as the statements had not been made under an impression of immediate death, *i. e.*, not *in articulo mortis*, they were inadmissible. But the learned judge said :—" It is not necessary that the person making the declaration should believe himself to be in danger of immediate death, if he believes that he will not recover from the disorder under which he is labouring. *Reg. v. Van Butchell* is an exceptional case. . . . The deceased was of opinion throughout that she would die ; and I receive her statement." The learned judge, in the same case, also received evidence of a subsequent declaration, made by the deceased after she had recently said that "she was better ;" but no other evidence had been offered to show that her previous impression, of death ensuing before long, had been altered.

In a still later case the deceased made a declaration, stating at the time that he believed he should not recover. His spine was then broken in such a way that death must have followed soon. Shortly before he had made the declaration, he had said to a witness: "The surgeon has given me some little hope that I am better ; but I do not myself think that I shall ultimately recover." The declaration was held to be admissible.²

¹ *R. v. Harvey*, MS. and 23 L. T. 258.

² *R. v. Reany*, 26 L. J. 43, M. C.

Where the prisoner was indicted for poisoning J. K., and it appeared that J. K. had eaten some cake and died; soon after which, the servant who had made the cake ate some, and died also; it was held by Coltman, J., after consulting Parke, B., that the dying declarations of the servant were evidence against the prisoner, because the two consecutive deaths formed one transaction.¹

It is held strictly, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. Accordingly, where the defendant had been indicted by the deceased for perjury, and after conviction had shot the prosecutor, it was held that a dying declaration by the latter as to the circumstances of the perjury was inadmissible, on an application by the defendant for a new trial.² So where the prisoner was indicted for administering savin to a pregnant woman, but not quick with child, with a view to procure abortion: Bayley, J., rejected evidence of her dying declaration concerning the cause of her death, because the death was not the subject of the pending inquiry.³ But it appears that in two old cases of perjury, evidence of a confession by a deceased accomplice has been received.⁴ This doctrine, however, could hardly be supported in the present day.⁵

The dying declarations of an accomplice are receivable,⁶ and also dying declarations made in favour of the person accused.⁷

¹ *R. v. Baker*, 2 M. & R. 53.

² Per Abbott, C. J.: *R. v. Mead*, 2 B. & C. 605.

³ *R. v. Hutchinson*, 2 B. & C. 608, n.; *R. v. Lloyd*, 4 C. & P. 233.

⁴ Per Lord Ellenborough: *Aveson v. Kinnaird*, 6 East, 195; and see 1 Camp. 210.

⁵ *Doe v. Ridgway*, 4 B. & Ald. 53.

⁶ *R. v. Tinkler*, 1 East P. C. 354.

⁷ *R. v. Scaife*, 1 M. & R. 551.

CHAPTER XIII.

ON EVIDENCE OF HEARSAY DECLARATIONS AGAINST INTEREST.

WHEN a deceased person, whose veracity in other respects is unimpeached, has, during his lifetime, made a statement concerning the matter in issue, which statement was at the time opposed to his pecuniary or proprietary interest, the legal presumption is that the statement is true, or that it contains at least some elements of credibility. For in all the exceptions to the general rule by which hearsay is excluded, it must be remembered that credibility is by no means a necessary consequence of admissibility. English law, although frequently arbitrary, and perhaps unreasonable, in its dogmatic distinctions between credibility and incredibility, refuses to reject any evidence which it considers to contain any ingredients, however minute, of presumptive truth ; but, while admitting it, the judge will often intimate to a jury, that they ought to give it little credit.

The rule which is now to be considered is the following :—

A declaration by a deceased person, who had a competent knowledge of a fact, and no interest to pervert it ; and which declaration was against the pecuniary or proprietary interest of the declarant at the time when it was made ; is evidence as to

third parties, and is evidence of everything stated in the declaration.¹

In the leading case of *Higham v. Ridgway*,² to prove the time of a birth, evidence was given, that the man-midwife, who attended the birth, was dead ; and the books of the latter, who had kept them regularly, were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date. There was also a charge for attendance, against which the word "paid" was marked. It was held, that the entry was evidence of the time of the birth. Lord Ellenborough, C. J., said :—"The entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it was not true, but he had an interest the other way, not to discharge a claim, which it appears from other evidence that he had." And Bayley, J., added :—"All the cases agree, that a written entry by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself ; there being no interest of his own to advance by such entry. . . . The principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime." So, in a later case,³ the same learned judges received evidence of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its actual date. In this case the charges for preparing the lease appear to have been paid, but not upon the face of the entries. Accordingly, Lord Ellenborough, C. J., seems to have

¹ 2 Russ. 67 n. ; *Middleton v. Melton*, 10 B. & C. 328, Parke, J.

² 10 East, 109 ; 2 Smith L. C. 183.

³ *Doe d. Reece v. Robson*, 15 East, 33.

extended the principle beyond the limit which is conceived still to be established. His Lordship said:—"The ground upon which this evidence has been received is, that there is a total absence of interest in the party making the entries to pervert the fact, and, at the same time, a competency in them to know it." But Bayley, J., received the evidence strictly as being against the interest of the declarant; and the above dictum of Lord Ellenborough, if it is to be received as a literal exposition of the conditions essential to this class of evidence, is quite irreconcilable with the current of previous and subsequent authorities.¹ But it is more reasonable to presume, that his Lordship, in dwelling on one essential condition, omitted to advert to another which he may have considered too indisputable for commentary.

It may, therefore, be considered as an established principle, that, although it is necessary, it is not enough, that this class of declarations should be made by one who has no interest to pervert the facts. The declaration must be against either the pecuniary, or, as is sometimes added, the proprietary, interest of the declarant. This doctrine may be considered as finally settled by the *Sussex Peerage Case*.² There, declarations as to the marriage of Lady Augusta Murray with the Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. But all the judges concurred in holding, that the declaration must be *adverse* to some *pecuniary* interest in the declarant; and that even the fear of a prosecution was not a sufficient interest to let in a

¹ See cases cited in *Barker v. Ray*, 2 Russ. 67.

² 11 Cl. & Fin. 103 to 114.

declaration as contrary to it. Lord Campbell said :—
“ As to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it in a pecuniary point of view. I think it would lead to most inconvenient consequences, both to individuals and the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence.”

It is also settled law that the declaration, or written statement, is evidence of all the facts which it contains. Thus, according to Parke, B., the entry in *Higham v. Ridgway* was evidence, not only of the payment of the man-midwife's charges, but also of *partus cum forcipe*.¹

In *Davies v. Humphreys*,² which was an action for contribution by one of several makers of a promissory note against a co-surety, the plaintiff, to establish the suretyship, relied on a receipt indorsed on the note by the deceased payee, acknowledging a part payment of 280*l.* of the principal sum of 300*l.*; and adding “ the 300*l.* having originally been advanced to E. H.,” (the defendant.) This was held to be evidence of the defendant's liability. Parke, B., in delivering the judgment of the court, said :—“ That the receipt was evidence of the fact of payment, which is admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to show that the 300*l.* was advanced to E. H. . . . But the entry of a payment against the interest of the party making it has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it.” His Lordship then, after referring to *Higham v. Ridgway*, and *Doe v. Robson*,³ added: “ Without overruling these cases (and we do not feel

¹ 21 L. J. 1, Ex.

² 6 M. & W. 153.

³ Sup. p. 130.

ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that 280*l.* was paid by the plaintiff to the payee, as for a debt due from E. H. as principal, but also of the fact, that the debt was due from E. H. to him."

Thus, also, where a paper purported to be an entry, by a deceased receiver, of rents received from T. H., as one of three proprietors, it was held to be evidence that two other proprietors were equally interested with T. H. In this case, Pollock, C. B., drew an important distinction between entries made against interest, and entries made in the course of business. His Lordship said:—"If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter."¹

It is held, that declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay.²

Thus, in *Percival v. Nanson*, Alderson, B., said:—"An entry in an attorney's bill of a service of notice on A. B. would be evidence of a service, although such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of such service." And Pollock, C. B., said at the same time:—"So, if an accoucheur puts down in his book the name of a lady whom he had delivered, and debits himself with the payment, such entry would be evidence of the name, although he may have known nothing of her name except from the information of others."³

The declarant must be deceased at the time when the evidence is offered. Thus, in *assumpsit* on a pro-

¹ *Percival v. Nanson*, 21 L. J. 1, Ex.

² *Crease v. Barrett*, 1 C. M. & R. 919.

³ 21 L. J. 2, Ex.

missory note by an indorsee against the maker, the defendant, to prove fraud and the plaintiff's cognisance of it, tendered declarations of the first indorsee, who was alive, but not called. They were rejected; and Lord Denman, in delivering the judgment of the court, said:—"It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them."¹ Here there was held to be no community or privity of interest between the plaintiff and the absent witness; but if that had existed, the evidence would have been admitted according to the principle already quoted, as laid down by Bayley, J., in *Spargo v. Brown*.² So it has been held that the entries of a person against his interest are not evidence between third parties, if the declarant be alive, although it appear that he has absconded on a criminal charge, and that it was quite impossible to produce him as a witness.³

But an entry by a deceased person, against interest, will be good evidence, although it appear that persons are living, and not called, who are acquainted with the fact. Thus, entries by a deceased collector, charging himself with the receipt of taxes, were received as evidence against a surety that the money had been paid; although the persons who paid it were living, and might have been called. An attempt was made in this case to exclude his evidence, because the entries were contained in a private note-book, and not a public account-book; but the distinction was overruled.⁴

Although it seems from the preceding cases to be at length clearly established, notwithstanding some adverse authorities, that declarations against interest

¹ 10 Ad. & El. 106.

² Sup. p. 86; 9 B. & C. 938.

³ *Stephen v. Gwenap*, 1 M. & R. 120.

⁴ *Middleton v. Melton*, 10 B. & C. 317.

are evidence of all facts to which they refer, without corroborative evidence dehors of the charge which is entered as liquidated,¹ yet it appears to be necessary that extrinsic evidence should be given to show that the person making the entry or declaration was in the situation in which he purports to be. The character of the party making the entry or declaration must be established before the entry is read, unless they be made by a person in a public character, in which case due appointment will be presumed.² But agency must be proved, where the declaration was by an agent. Thus, accounts of rents signed by a person styling himself clerk to a steward, but not proved *aliunde* to have been so employed, although they were found among family muniments, were rejected, because there was no other parol evidence to show that they affected the declarant in a pecuniary character.³ But proof of handwriting, and other extrinsic evidence of authenticity, will be unnecessary when entries have been made thirty years previously, and are produced from proper custody.⁴

There appears to be no distinction between oral and written declarations for the purposes of this rule. This view seems to have been recognised in the *Sussex Peerage Case*; and to be supported by subsequent authority.⁵

As miscellaneous instances of cases, in which declarations against interest have been admitted as evidence, the following may be mentioned. Where a deceased tenant, by a written instrument, acknowledged L. as his landlord, this was held to be evidence of L.'s title as against subsequent tenants who did not claim through the declarant.⁶ So, in ejectment by A., the

¹ *Doe v. Vowles*, 1 M. & R. 166; contra, *R. v. Heyford*, 2 Sm. L. C. 194 a, and note.

² *Davies v. Morgan*, 1 C. & J. sup. p. 54.

³ *Baron de Rutzen v. Farr*, 4 Ad. & Ell. 53.

⁴ *Wynne v. Tyrwhitt*, 4 B. & Ald. 376.

⁵ 2 Smith L. C. 197, n.; *Edie v. Kingsford*, 23 L. J. 23, C. P.

⁶ *Doe d. Lindsey v. Edwards*, 5 A. & E. 95.

declaration by deed of a deceased receiver of rents and profits, that he held under A.'s ancestor, is evidence against third parties of A.'s title.¹ So, a declaration by a deceased occupant, that he managed an estate for the claimant, is evidence for the latter.²

In an action by the corporation of Exeter for port duties, documents more than thirty years old, which purported to be the receipt of such duties by ancient receivers, but which were unsigned and in the third person, were admitted.³ So, the receipts of an ancient receiver of rents, brought from the muniment chest of the family, are unobjectionable evidence.⁴

Where there is privity of interest between the declarant and a party, the declaration is received on this ground; and it will be admissible, even though the declarant be alive.⁵ But neither the acts nor the declarations of deceased tenants, although against their interest, are any evidence against the reversioner; for a tenant cannot derogate from the title of his landlord. Therefore, in a disputed right of common, the plaintiff was not allowed to give evidence of declarations made concerning it by a deceased former tenant of the farm, in respect of which the plaintiff claimed the right.⁶

It will be observed that, in all the preceding cases where entries have been tendered, great stress has been laid on the circumstances of the custody from which they are produced. The declarations, under consideration, are also subject to the remarks which have been made on the declarations discussed in the two preceding chapters, as to the necessity that they must be made *ante litem motam*.

This rule is said to have been somewhat extended

¹ *Doe d. Daniel v. Coulthard*, 7 A. & E. 235.

² *Baron de Bode's case*, 8 Q. B. 208.

³ *Mayor of Exeter v. Warren*, 5 Q. B. 573.

⁴ *Musgrave v. Emerson*, 16 L. J. 175, Q. B.

⁵ *Woolway v. Rowe*, 1 A. & E. 114.

⁶ *Pavendick v. Bridgwater*, 24 L. J. 289, Q. B.; Sup. p. 154.

to an anomalous class of cases, where the declarations have been made by persons who have had no interest to misrepresent facts. The privilege, as it really exists, appears to have been confined to ecclesiastical cases in which a vicar or other incumbent has claimed a benefit on the ground of an entry or statement made by a former incumbent. But the cases are obscure and the doctrine doubtful. In several instances, also, the statements appear to have been admissible as being against interest. It is not conceived to be necessary to do more than notice the questionable existence of these exceptions.¹

It has been said that, in the case of an entry against interest, "proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made, it is admissible."² The first part of this dictum applies of course only to entries made within thirty years prior to the time when they are tendered.³

¹ See cases referred to; Rosc. N. P. 1 Phill. 267 to 270.

² Parke, B.: *Doe d. Patteshall v. Turford*, 3 B. & Ad. 898.

³ Ante, p. 135.

CHAPTER XIV.

ON EVIDENCE OF DECLARATIONS MADE IN THE COURSE
OF PROFESSIONAL DUTY.

It was stated in the last chapter, that, notwithstanding some adverse authorities, declarations are not admissible merely because the deceased witness had no apparent interest to misrepresent the truth. But there is a class of cases, which are now to be considered, in which this condition, coupled with proof that the deceased made the declaration in the course of his trade or professional duty, is held to be a sufficient reason for admitting the statement in evidence. The foundation of this rule will not perhaps sustain a close analysis; but, as in declarations against interest it is presumed that no man will wilfully or fraudulently state falsely what is injurious to his pecuniary advantage, so in the present case it is presumed that the deliberate statement by a man of anything which he has done strictly in the course of his daily duty presents a *primâ facie* presumption of credibility.

The philosophy of this doctrine may appear to be disputable; but it may at least be regarded as a legal compliment to human nature. It has therefore long been a settled principle that—

Declarations made by a person, strictly in the course of his trade or professional duty, and without any apparent interest to misrepresent the truth, if contemporaneous with the fact, are evidence,

after his death, against third persons, of the essential subject-matter, but not of its surrounding circumstances.

Price v. Torrington is generally cited as the leading case on this rule.¹ The short report of it in Salkeld is as follows:—The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brewhouse and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery: but otherwise of the shop-book itself singly, without more.

Accordingly, in *Pritt v. Fairclough*,² after evidence had been given that it was the course of business in the plaintiff's office for a deceased clerk to copy all letters, a letter-book containing a letter, which purported to be the copy by the deceased of a letter which the defendant refused to produce, was held good secondary evidence. So, where it was material to show that a licence had been sent to A. by the plaintiff, evidence was given, that it was the course of business in the plaintiff's office that such licences should be copied in the letter-book and noted before they were sent; and the copy and noted memorandum, in the handwriting of a deceased clerk, that the licence had been sent, were then received.³

In an important case⁴ of ejectment, the lessor of the plaintiff had instructed A. to serve the defendant with notice to quit. A. entrusted the commission to his

¹ Salk. 285 ; 1 Sm. L. C. 139 and notes.

² 3 Camp. 305.

³ *Hagedon v. Reed*, 3 Camp. 379.

⁴ *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890.

partner B., who had not served such notices before. B. prepared three notices to quit (two of them being to be served on other persons), and as many duplicates. He then went out, and on his return delivered to A. three duplicate notices (one of which was a duplicate of the notice to the defendant), indorsed by B. It was proved that the two other notices had been served on the persons for whom they were intended; that the defendant had subsequently requested A. that he might not be compelled to leave, and that it was the invariable practice for A. and B.'s clerks, who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. It was held, on these facts, that the third duplicate was admissible to prove that the notice had been served on the defendant. Parke, B., said:—"It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that the principal observed the rule of the office as well as the clerks." And Taunton, J., observed:—"A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that that fact occurred, is admissible in evidence."

This doctrine may be considered as finally settled by *Poole v. Dicus*.¹

There it was held that an entry made in a bill-book, in the course of business, by a notary's clerk, since deceased, of the dishonour of a bill which he had been instructed to present for payment, was evidence of the dishonour.

In this case, and in the previous one of *Doe d. Patteshall v. Turford*, great importance was attached to the fact that the entries were immediately subse-

¹ 1 Bing. N. C. 649.

quent to, and virtually contemporaneous with, the transaction. In the former case, Parke, B. said :—"It is to be observed, that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception ; at whatever time it is made it is admissible ; but in the other case [*scil.*, in declarations in the course of business], it is essential to prove that it was made at the time it purports to bear date : it must be a contemporaneous entry." So, in *Poole v. Dicus*, Tindal, C. J., said :—"If there were any doubt whether the entry were made at the time of the transaction, the case ought to go down to trial again." It seems, however, to be sufficient if the entry be made on the same day, or even on the following morning.¹

It has been intimated that, according to the dicta of the judges in *Doe v. Turford* and *Percival v. Nanson*, an entry in the course of business, unlike an entry against interest, is evidence only of the facts which it was the duty as well as the custom of the deceased declarant to enter. The cases on this head are not quite consistent ; but the general rule appears still to be maintained according to the principle laid down in *Chambers v. Bernasconi*, which was argued first in the Exchequer and then in the Exchequer Chamber.² In that case, in order to establish an act of bankruptcy by keeping house, it was necessary to prove the place where the plaintiff had been arrested ; and the evidence offered was a paper, brought from the file of the undersheriff, and addressed to him, and purporting to be signed by the deceased officer who had made the arrest. The paper was as follows :—

"9th November, 1825.

"I arrested Abraham Henry Chambers, the elder only, in *South Molton Street*, at the suit of William Brenton.

"Thomas Wright."

¹ Tayl. § 636.

² 1 Tyr. 335 ; S. C. 4 Tyr. 531.

It was proved that, by the course of the office, the officer was required, immediately after an arrest, to transmit to the sheriff's office a memorandum or certificate of the arrest; and that for the last few years an account of the place where the arrest took place had been also required from him. The court held the document not to be admissible evidence of the place of arrest, apparently on the ground that it was not the officer's duty to make the entry of the place, because the strict course of office business could not be considered to be affected by the recent innovation in its practice. Lord Denman, in delivering judgment, said:—"We are all of opinion that, whatever effect may be due to an entry, made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." Accordingly, an entry by a deceased steward of a matter not in the course of his duty, but only important, in his opinion, to his master's interest, will not be received.¹ It is right to observe, that the decision on the particular facts in *Chambers v. Bernasconi* has been much criticized by learned judges and other authorities; but the principle on which it was given, viz., that the act was not in the course of a duty, but collateral to it, is recognised as settled.²

¹ *Doe d. Padwick v. Skinner*, 18 L. J. Ex. 107; see also 20 L. J. 297, Ex.

² 1 Phill. 292; *Poole v. Dicus*, 1 Bing. N. C. 649, per Tindal, J., and Parke, B.: 1 Sm. L. C. 141.

On the general doctrine, it seems to have been taken for granted, in a late case, that an entry of the receipt of rates, by the deceased clerk of a collector, is evidence of the payment of rates, under the 4 & 5 Will. 4, c. 76.¹

When the entry has been made on hearsay, it will not be received. Thus, in an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who in the course of business had himself been informed of the delivery by the collier whose duty it was to deliver the coals, and who was also dead, the entry was rejected. This case is also to be remarked, as containing the opinion of Lord Abinger, that the doctrine of *Price v. Torrington*, ought not to be extended.²

It appears to be now settled law, that there is no distinction between verbal and written declarations made in the course of a duty, so far as regards their admissibility. But oral evidence will not be received to contradict, nor even to explain, a written entry which has been made in the course of business. Thus, in *Stapylton v. Clough*,³ to prove service of a notice to quit, a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; but it was also sought to explain and vary the particulars of the indorsement, by evidence of subsequent oral declarations made by the deceased. But the court held, that the indorsement must be received as it stood; and Lord Campbell said:—"I agree with what I am reported to have said in the *Sussex Peerage Case*, that there is no distinction between verbal and written declarations made in the course of a duty, so far as regards their admissibility.⁴ But to deduce from this doctrine that whatever is

¹ *R. v. St. Mary, Warwick*, 22 L. J. 109, M. C.

² *Brain v. Price*, 11 M. & W. 773.

³ 23 L. J. 5 Q. B.

⁴ Sup. p. 135.

said subsequently to the time of making the entry respecting the transaction may be admitted in evidence, would lead to the greatest injustice. How can it be said, that the verbal declaration of Jackson was made in the course of his duty? What he did in discharging his duty was signing the written entry. What he may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting, as it does here, what he has before written."

Several cases are collected by Mr. Phillipps, in which indorsements on bonds and notes, by the obligee or payee, of payment of interest, or part of the principal, have been received, on somewhat anomalous grounds, partly as declarations against interest, and partly as declarations in the course of business.¹ These cases are now subject to Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 3, by which it is enacted, that "no indorsement or memorandum of payment, written or made upon any promissory note or bill of exchange, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the Statute of Limitations." On this section it has been decided, in an action by the executor of the payee of a promissory note against the maker, that an entry, made by the plaintiff, under the direction of the deceased, in a memorandum book, acknowledging the receipt of interest within six years, took the case out of the statute.² But here the declaration was received as against the interest of the deceased.

When the entry or declaration does not appear to have been in the course of a trade or professional duty, but only a personal custom, not creating responsibility in the declarant, it is inadmissible. On this principle, the account books of deceased tradesmen, made by themselves, are not evidence for their executors to charge a

¹ 1 Phill. 297 to 301.

² *Bradley v. James*, 22 L. J. 193, C. P.

debtor. Thus, in *Reg v. Worth*,¹ to prove a settlement by hiring and service, the following document, made, according to personal custom, in the memorandum book and handwriting of the pauper's deceased master, was tendered:—

“April 4, 1824.—W. W. (the pauper) came, and to have for the half year 40s.

“September 29.—Paid this 2*l*.

“October 27.—Ditto came again; and to have 1*s*. per week: to March 1825, is 21 weeks 2 days, 1*l*. 1*s*. 6*d*.

“25th.—Paid this.”

The court held this evidence to have been rightly rejected. Lord Denman said:—“In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible. The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services referred to had been performed; and whether, on dispute, a jury would have found him liable for the sum so entered, or more or less, we cannot say. Nor was this an entry made in the course of duty, as in *Doe d. Patteshall v. Turford*.² The act there was performed by a principal in the firm, and not by a clerk; but it was done by a person acting under the same responsibility.” The other judges delivered similar judgments.

Declarations in the course of business are inadmissible while the declarant is alive.³ So, entries by a witness who is alive are not evidence *per se*, but may be used by him for the purpose of refreshing his memory.⁴

¹ 4 Q. B. 133.

² Sup. p. 139.

³ 1 Esp. 328.

⁴ 4 Q. B. 139.

CHAPTER XV.

ON EVIDENCE OF STATEMENTS AT FORMER TRIALS BY
DECEASED OR ABSENT WITNESSES.

ON the general principle by which hearsay is inadmissible evidence, the statements of witnesses at former trials cannot be received generally. The exception to this principle is contained in the rule that—

In a matter between the same parties, the depositions of a witness at a former trial may be used on a subsequent trial, if the witness be dead; or if he be sought and cannot be found; or if he have been subpoenaed and have fallen sick on the way.

But the matter in issue must be the same, and the depositions cannot be given in evidence against any person who was not a party to the suit; and the reason is, because he had not liberty to cross-examine the witness.¹

The general rule has been thus stated by Mansfield, C. J. :—"What a witness, since dead, has sworn upon a trial between the same parties, may be given in evidence, either from the judge's notes, or from notes that

¹ Bull. N. P. 238, 239, a.

have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given.”¹

The same rule holds if a witness be kept away by collusion, or other improper means. Thus, in an old case where a witness was sworn in a trial at C. B., and was subpoenaed by the defendant to appear at a subsequent trial in K. B., but did not appear; persons were admitted to prove what his evidence was at the first trial, because the court conceived there was reason to presume that he was kept away by the petitioner.² But it appears to be doubtful whether every species of mere subsequent incapacity will let in evidence that has been given at a former trial.³

It appears that under the 11 & 12 Vict. c. 42, s. 17, it is not necessary to prove that a witness absent from illness is so ill as to be unable to attend, but it is sufficient if it appear that it would endanger his life to attend.⁴ The full effect of the above statute, and the circumstances under which the depositions of deceased or absent witnesses will be received, according to its requirements, will be considered under the head of secondary documentary evidence.

If a party give evidence of a former trial to show that a verdict was improperly obtained, the other party may rebut it by proof of other evidence given at the first trial, although the second trial be not between the same parties nor on the same rights.⁵

On a new trial of an issue, out of Chancery, oral evidence of the statements at a former trial of a deceased witness were received, although the Master of the Rolls had made his usual order for reading the deposi-

¹ *Mayor of Doncaster v. Day*, 3 Taunt. 262; 8 Q. B. 245.

² *Green v. Gatewick*, Bull. N. P. 242, b.

³ *R. v. Eriswell*, 4 T. R. 707.

⁴ *R. v. Day*, per Platt, B., 19 L. T. 35.

⁵ *Doe. d. Lloyd v. Parsingham*, 2 C. & P. 440.

tions in equity of such witnesses as had died since the first trial.¹

In order to render a deposition of a deceased or absent witness admissible, it must appear that it was taken on oath in a judicial proceeding in some cause, and that the party to be affected by it had an opportunity to cross-examine the witness.²

It appears to be open to the parties to enter into an agreement, that the judge's or shorthand writer's notes at the first trial shall be received as evidence in the second; and after such consent neither party can dispute its validity.³ But the court will require distinct evidence of every such agreement.⁴

The statements of absent witnesses are frequently tendered in the form of depositions by persons who have been examined, either in this kingdom or abroad, on interrogatories pursuant to commissions issued out of the Courts of Chancery or Common Law. Their admissibility will be discussed under the head of written evidence.

A question has often arisen, and has never yet been satisfactorily decided, as to how far a judge's notes are evidence of what took place at a former trial, and whether the judge himself may be made a witness. It would appear from the dictum of Mansfield, C. J., in *Mayor of Doncaster v. Day*, already cited, that a judge's notes at a former trial are evidence on a subsequent trial; and although, strictly speaking, this cannot, perhaps, be regarded as included in the principle by which courts take cognisance of the acts and signatures of public officers, inasmuch as judges, *virtute officii*, are not required to take notes of the cases before them, but do so merely for their own personal convenience and satisfaction; yet, considering that their notes have all

¹ *Tod v. Earl of Winchelsea*, 3 C. & P. 387.

² *Hullock, B.*: M'Clel. & Y. 169.

³ *Wright v. Doe d. Tatham*, 1 A. & E. 20, S. C.

⁴ 1 A. & E. 789; Lord Denman.

the authenticity and value of public documents, there seems to be no reason why, even without the aid of a statute, such notes, purporting to be signed by the judge, should not be received as good evidence. Since, also, it appears to be the more established doctrine that the judge himself cannot be made a witness as to what took place at the former trial; and, even if this were allowed, his presence would only serve the purpose of authenticating his notes, to which he would necessarily refer, and which he would follow literally; every argument of public policy seems to be in favour of receiving such notes as evidence *per se*. But there appears to be no express English decision on the point; and Mr. Phillips and Mr. Taylor speak doubtfully on it, the former inclining to the affirmative, on the dictum of Mansfield, C. J., and the latter to the negative, according to Greenleaf and some American authorities.¹

It appears to be understood that a judge cannot be called to give evidence of the substance of a former trial, but that he may be called to prove anything collateral or incidental to it.² In *R. v. Gazard*, Patteson, J., recommended the grand jury not to examine one of their number, who had been chairman at the quarter sessions on the trial in which the prisoner had committed an alleged perjury. His lordship said:—"It is a new point, but I should advise the grand jury not to examine [the gentleman]; he is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." But in a trial for perjury, under a committal by a county court judge, Byles, J., held that the judge ought to have been called to prove the perjury from his notes; and that the rule prohibiting the calling of judges as witnesses is confined to judges of the superior courts. His Lordship said:—"If you had called

¹ 1 Phill. 307 ; Tayl. 352 ; Greenleaf, 197 ; 2 Russ. Cr. 650.

² *R. v. Gazard*, 8 C. & P. 595 ; *R. v. Earl of Thanet*, 27 How. St. Tr. 845 to 848.

me, I should not have come.”¹ In the Divorce Court the notes of the Judge Ordinary are evidence *per se* on an appeal.²

It is sufficient that evidence of what occurred at a former trial, when admissible, should be substantially without being literally correct, except where actual words are the gist of the issue. Thus, on an indictment for perjury, evidence of the words spoken, coupled with a confident conviction on the part of the witness that they were all that was material to the pending inquiry, and that they were not qualified by other expressions, was held by all the judges to be sufficient.³

¹ *R. v. Harvey*, 8 Cox Crim. Cas. 99.

² *Austin v. Austin*, 28 L. J. 8, P. & M.

³ *R. v. Rowley*, 1 M. C. C. 111.

CHAPTER XVI.

ON ADMISSIONS.

WHEN a party to an action or suit has either expressly, or by necessary implication, admitted the case of an opposite party, the latter is not required to prove it.

Admissions, properly so called, can be made only in civil actions or suits, and are not allowed in criminal proceedings. They are regarded as being a waiver of proof on the part of their makers, rather than as evidence against them. They are *potius ab onere probandi relevatio, quam proprie probatio*.¹ In the form of parol statements they are not conclusive, but only *primâ facie* evidence against their makers. But when they assume the form of admissions by record, or under seal, they become conclusive.

In *Heane v. Rogers*,² Bayley, J., said:—"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another

¹ Mascardus, Greenl. 201.

² 9 B. & C. 586.

person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers."

"An estoppel," it has been said, "is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it, though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol; * * and this is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose."¹

The highest species of estoppel is between parties to a record and their privies, on the principle *interest reipublicæ ut sit finis litium*: and hence the facts, actually decided by a verdict, cannot

¹ 2 Sm. L. C. 437-8.

be litigated again between the same parties, and are conclusive evidence of the state of the issue between them.¹ So it is held to be unnecessary to give evidence of facts which are admitted distinctly by the pleadings on the record; nor can evidence be received to dispute such admissions. But it is also held that such admissions of a fact on the record amounts only to a waiver of proof of that fact; and that if the adverse party seeks to have any inference drawn from the fact so admitted he must prove it like any other fact.² There is some conflict of authority on the question whether facts, not traversed distinctly by the pleadings, may be treated as admitted sufficiently to dispense with the necessity of their being proved by the other party.³ A party's statement in court cannot be treated as an admission.⁴

The same principle applies where the interest is the same with, or derived from, a person who would have been estopped, if he had been a party. Thus, an heir is estopped by a verdict against the ancestor through whom he claims; an executor by a verdict against his testator; and a husband who claimed through his wife, by a verdict, before her marriage, against her in respect of the same claim.⁵ So, the lord by escheat, the tenant by the curtesy, and the incumbent of a benefice, are bound by, and may take advantage of, estoppels.⁶ But in all such cases the same point must have been in issue; for a verdict between two parties on one issue can have no effect on another issue between them.⁷ So, where the admissions are tendered on the ground of privity of interest, such identity or privity must appear clearly; and "nobody can take

¹ *Boileau v. Rutton*, 2 Exch. 665.

² *Edmunds v. Groves*, 2 M. & W. 642.

³ *Boileau v. Rutton*, sup. s. v. *Smith v. Martin*, 9 M. & W. 304.

⁴ *Darby v. Ouseley*, 25 L. J. 233, Ex.

⁵ 2 Smith's L. C., notes to *Duchess of Kingston's case*.

⁶ Co. Litt. 352 b.; *Outram v. Morewood*, 3 East, 346.

⁷ 2 Smith L. C. 443.

benefit by a verdict, who would not have been prejudiced, if it had gone the other way.”¹ Therefore, an award in favour of a tenant in a previous action is not evidence of title for the reversioner in a subsequent action against a person claiming through the defendant in the first action.² Thus, also, as no privity exists between a landlord and his tenant, and it is also a principle that a tenant cannot derogate from his landlord’s title, the admission of a tenant is no evidence against his landlord. Therefore, a declaration by a tenant that he was not entitled to a right of common in respect of his farm, has been held to be no evidence that such a right did not belong to the reversioner.³ It seems, however, that an identity of interest may be constituted by any amount of legal or equitable privity. Thus, the admissions of a party to a record are receivable to defeat the interest of a third person, although the former is only a nominal party and trustee for the latter; for the court will not look on any party to a record as a cipher.⁴ But it is doubtful how far the admission of a *cestui que trust* can be received to defeat the claim of the trustee on the record.⁵ On the general principle, a verdict and conviction for nonrepair of a highway estops the convicted party or parish from disputing subsequently their liability to repair the highway.⁶ But a conviction for obstructing a highway does not estop the convicted person from maintaining trespass against a prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right.⁷

The rule that parties and privies are estopped by a

¹ Gilb. Evid. p. 28, per Cur. ; 25 L. J. 46, Q. B.

² *Lady Wenman v. Ash*, 25 L. J. 44, Q. B.

³ *Papendick v. Bridgwater*, 24 L. J. 289, Q. B. Sup. p. 136.

⁴ *Bauerman v. Radenius*, 1 T. R. 663; 2 Smith L. C. 227.

⁵ *Doe d. Rowlandson v. Wainwright*, 8 A. & E. 691.

⁶ *R. v. Haughton*, 22 L. J. 89, M. C.

⁷ *Petree v. Nuttall*, 25 L. J. 200, Ex.

judgment on identical issues, extends to judgments pronounced by foreign courts of competent jurisdiction on such issues.¹

The next superior species of estoppel is by instruments under seal ; and this kind of estoppel, as in the case of estoppel by record, is equally binding on the parties to the deed and those who claim under them. "The principle is that where a man has entered into a solemn engagement by deed under his hand and seal, as to certain facts, he shall not be permitted to deny any facts which he has so asserted."² Thus, a lease is evidence for and against a lessee of the terms on which he holds, and also for an assignee who claims under him.³ So, a recital in a deed is evidence against him who executed the deed, and against every person claiming under him.⁴ So, the substance of a recital carries with it the context ; and, in a record, is conclusive evidence of collateral matter which was necessary to support the groundwork of the judgment.⁵ In construing recitals in deeds, and determining how far they operate as estoppels on the parties, the effect must be gathered from the apparant intention of the instrument.⁶ The recital of a deed of a former deed between the same parties proves, as between such parties, so much of the former deed as is recited, and no more.⁷

A recital is conclusive evidence against parties only where it is distinctly antecedent to, and related to, the substance of the deed. In other cases recitals are treated as *primâ facie* evidence which may be rebutted.⁸

¹ 2 Smith L. C.; *Duchess of Kingston's case*, and notes generally on Estoppels; *Cammell v. Sewell*, 27 L. J. 447, Ex.

² Taunton, J.: 2 Ad. & El. 291.

³ *Houghton v. Kœnig*, 25 L. J. 218, C. P.

⁴ Com. Dig. Evid. (B. 5.)

⁵ *R. v. Hartington*, 24 L. T. 327, Q. B.

⁶ *Stronghill v. Buck*, 19 L. J. 209, Q. B.

⁷ *Gillett v. Abbott*, 7 A. & E. 783.

⁸ 2 Sm. L. C. 443 to 445.

It is held that a party's own statements are evidence against himself, whether they corroborate the contents of a deed, or other written instrument, or not.¹ In such a case it has been decided that an abstract or affidavit used by a person on a reference before a Master to prove title in himself may be received against him in a subsequent litigation.² But in such a case the statement must be distinctly a statement of fact, and not merely an opinion or inference of law by the deponent; for in the latter case he will not be estopped.³

Parol admissions are either written or oral, and include all admissions, whether by word or act, which are not under seal. Such admissions constitute only *primâ facie* and rebuttable evidence against their makers, and those claiming under them, as between them and others, unless such others have been induced by the admissions to alter their condition, in which case the admissions are conclusive as to such other persons.⁴ Thus, the acknowledgment in a deed of consideration money received is conclusive between the parties;⁵ but a receipt not under seal, and only indorsed on the deed, is only *primâ facie* evidence that the money has been paid.⁶ So, a receipt, indorsed on a bill, and generally all parol receipts are only *primâ facie* evidence of payment. It has been held, indeed, in an action by assignees in a bankrupt's name, that a receipt in full of all demands by the nominal plaintiff is conclusive against his assignees;⁷ but it seems that this case is not law;⁸ and it has been held that a plaintiff who had given the defendant a receipt for

¹ *Slatterie v. Pooley*, 6 M. & W. 664.

² *Pritchard v. Bagshawe*, 11 C. B. 457.

³ *Morgan v. Couchman*, 23 L. J. 46, C. P.

⁴ *Graves v. Key*, 3 B. & Ald. 318, and notes; *Newboy v. Liddiard*, 12 Q. B. 925.

⁵ *Baker v. Dewey*, 1 B. & C. 704.

⁶ *Stratton v. Rastall*, 2 T. R. 366.

⁷ *Alner v. George*, 1 Camp. 392.

⁸ *Bowes v. Foster*, 27 L. J. 262, Ex; 30 L. T. Rep. 306.

sold goods with a view to defraud his creditors was not estopped from showing that no money had passed, and that no sale had ever taken place.¹

The admission of a partner is evidence against his co-partners; and that of an agent is evidence against his principal..

Thus, the admission by one of several plaintiffs, who sued as partners, that the subject-matter of the action was his own personal contract, has been received as evidence to bar the action.² And generally, in partnership transactions, the representations, although tortious or fraudulent, of a partner are binding on his co-partners.³ So, the admission of a retired partner as to a partnership transaction while he was in the firm, is evidence in an action against a continuing partner.⁴

When there is a joint interest, the admissions of one party concerning a material fact within his knowledge, are generally evidence against another party.⁵ Thus, an admission by one in his character of executor is evidence against his co-executor;⁶ and a receipt by one of two trustees is evidence against both.⁷

In *Whitcomb v. Whiting*,⁸ it was held that payment of interest by one of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others; and that such payment may be given in evidence in a separate action against any one of the others. It was also stated by Lord Mansfield in that case, that "an admission by one is an admission by all." But now, by Lord Tenterden's Act, 9 Geo. 4, c. 14, it is enacted, that no joint contractor shall lose the benefit of the statute by

¹ *Bowes v. Foster*, sup.

² *Lucas v. De La Cour*, 1 M. & S. 249.

³ *Rapp v. Latham*, 2 B. & Ald. 795.

⁴ *Wood v. Bradelech*, 1 Taunt. 104.

⁵ *Le Blanc, J.*: 11 East, 589.

⁶ *Fox v. Waters*, 12 A. & E. 43.

⁷ *Scarfe v. Johnson*, 3 B. & C. 421.

⁸ Dougl. 652; 1 Sm. L. C. 317.

the written acknowledgment or promise of another: but the effect of payment by one of such joint contractors is expressly reserved to continue as before the statute.¹

Before the acts or acknowledgment of one party can be made evidence against another, it must be proved that such a joint interest existed as creates an express or implied authority to bind.² It is not enough that there should be a mere community without an actual privity of interest. Thus, the court have refused to extend the doctrine of *Whitcomb v. Whiting*, to the case of a payment by one of two joint and several makers of a promissory note as against the executors of the other; and have held that such a payment does not take the note out of the Statute of Limitations as against the latter.³ So, payment by an executor of one of two such makers will not take the note out of the statute as against the other.⁴

In actions of tort and criminal prosecutions, the admissions of one defendant will not affect another.⁵

In settlement cases it has been held that the declarations of a rated parishioner are evidence against his own parish.⁶

In cases of principal and agent, the ordinary rule applies, *qui facit per alium facit per se*: and the principal will be affected by the admissions of his agent so far as they are within the scope of his authority; but not when they exceed it. Thus, it has been said:—"When it is proved that A. is agent of B., whatever A. does, or says, or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B."⁷ So, evidence of an

¹ *Bradfield v. Tupper*, 21 L. J. 6, Ex.

² *Dickinson v. Valpy*, 10 B. & C. 128.

³ *Atkins v. Tredgold*, 2 B. & C. 23.

⁴ *Slater v. Lawson*, 1 B. & Ad. 396.

⁵ 1 Phill. 371.

⁶ *R. v. Inhabitants of Hardwicks*, 11 East, 578.

⁷ Gibbs, C. J.: *Langhorn v. Allnutt*, 4 Taunt. 519.

interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter.¹

But the admissions of an agent, in order to be binding on his principal, must be part of the contract or *res gesta*; and therefore a letter from an agent to his principal, containing merely an account of his transactions, is not evidence against the latter.² But where an agent, within the scope of his authority, wrote to his principals that he had received a sum of money on their account, and they replied, giving directions as to its disposition, it was held that the agent's statement so recognised was evidence that the principals had received the money.³

A principal will not be prejudiced by the unauthorized admission of his agent. Thus, in *detinue* for goods against a pawnbroker, to prove possession evidence was rejected of a statement by the defendant's shopman, that "it was a hard case on his master, who had advanced money on the goods." It was held that such a statement was not within the scope of the shopman's authority, and Tindal, C. J., said:—"It is dangerous to open the door to declarations by agents beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent. . . . Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it."

It is not necessary to call the agent to prove his admissions:⁴ and in tort the statements of an authorized agent of the defendant as to the subject-matter of the

¹ *Reid v. Hoskins*, 26 L. J. 5, Q. B.; Sc.: Cam.

² *Langhorn v. Allnutt*, sup.

³ *Coates v. Bainbridge*, 5 Bing. 58.

⁴ *Irving v. Motley*, 7 Bing. 543.

action, have been received without the agent being called.¹

Joint-stock Companies, completely registered under 7 & 8 Vict. c. 110, are bound by the contracts of their directors, although all the statutory requisitions of sect. 44, have not been observed: but their authority to bind the company must be proved by the production of the registered deed, or other extrinsic evidence.² But a member of a projected Joint-stock Company, who has taken no active part in the preliminary proceedings, will not be affected by the admission of a secretary to such a company.³

Agency must be proved before the admissions can be received. But comparatively slight evidence is received as *primâ facie* evidence of authority. Thus, to prove authority to sign a guarantee, evidence that the agent, the defendant's son, had signed for the defendant in three or four instances and accepted bills, was held sufficient *primâ facie* evidence of agency.⁴ So, production of a writ, purporting to be signed by the plaintiff's town agent, coupled with a receipt for the sum claimed, purporting also to be signed by such agent, has been received to prove a plea of payment.⁵

The admissions of agents are receivable in criminal cases, but only to create a civil liability in the principal. Thus, on Lord Melville's trial for embezzlement, evidence was received of a receipt of public money by an authorized agent, to show that the money was actually received. Erskine, C., said :—"The first steps in the proof of the charge must advance by evidence applicable alike to civil and criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence; but it is a totally different question, in the consideration of

¹ *Peyton v. St. Thomas's*, 4 M. & Ry. 625, n.

² *Ridley v. Plymouth Company, &c.*, 2 Ex. 711.

³ *Burnside v. Dagrell*, 2 Ex. 224.

⁴ *Watkins v. Vince*, 2 Stark. 368.

⁵ *Weary v. Alderson*, 2 M & Rob. 127.

criminal justice, as distinguished from civil, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could, by no possibility, convict him of a crime."¹

The instructions of a principal to his agent are not evidence in contract against a third party, unless it be shown that they were communicated to the latter.²

The admissions of a guardian, or *prochein amy*, are generally not evidence against an infant who sues by him.³

An attorney is presumed to have authority for whatever he may say or do on behalf of his client: and his authority to make admissions in an action will be implied when he has been proved to be the attorney on the record.⁴ In *Young v. Wright*,⁵ Lord Ellenborough said:—

"If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for the purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause."⁶

Where an attorney on the record gave the following undertaking: "I hereby undertake to appear for A. and B., joint owners of the sloop *Arundel*," &c., this was held sufficient *primâ facie* evidence that A. and B. were such joint owners.⁷

But an admission before action commenced, by an attorney who afterwards appeared on the record, has been held insufficient, without proof that he was authorized at the time to make the admission.⁸

¹ 29 How. St. Tr. 746 to 764.

² *Smethurst v. Taylor*, 12 M. & W. 545.

³ *Cowling v. Ely*, 2 Stark. 366; s. v. *James v. Hatfield*, 1 Stra. 548.

⁴ *Gainsford v. Grammar*, 2 Camp. 9.

⁵ 1 Camp. 159.

⁶ See *Petch v. Lyon*, 9 Q. B. 147.

⁷ *Marshall v. Cliff*, 4 Camp. 133.

⁸ *Wagstaff v. Wilson*, 4 B & Ad. 339.

An admission by an attorney's clerk or agent, is as valid as an admission by the attorney.¹

Where the defendant's attorney, after a controversy had arisen, admitted in conversation with the plaintiff's attorney that his client's title was under B., and ended with B., and the plaintiff claimed as a remainderman after B., this was held to be a good admission of B.'s title.² So, in an action on a bill, an admission by the defendant's attorney that the acceptance was in his client's handwriting is evidence of acceptance, without production of the bill.³

It has been said that, if the parties have a particular controversy, and it seems plain that a certain fact is admitted, the jury, as men of common sense, may draw the same conclusion as to that fact as if it were formally proved before them.⁴ Accordingly, it seems to have been considered in a *Nisi Prius* case, that if counsel open statements which he does not prove, the opposite party may treat them as admissions: but this doctrine has been disputed in a later case.⁵ But generally counsel have authority to make all admissions, in civil cases, which they may think proper in the conduct of a case: and accordingly a special case signed by counsel on each side, at a former trial, has been held evidence of all the facts therein stated, at a subsequent trial.⁶ But ordinary and less formal admissions by counsel at a former trial are not evidence on a subsequent trial.⁷ In criminal cases it appears that attorneys have no authority to make admissions; and it seems that not even counsel have.⁸

¹ *Taylor v. Williams*, 2 B. & Ad. 845.

² *Dorrett v. Meux*, 23 L. T. 144, C. B.

³ *Chaplin v. Levy*, 22 L. T. 290, Ex.

⁴ *Alderson, B.*: 1 M. & W. 173.

⁵ *Duncombe v. Daniell*, 8 C. & P. 222; cont. *Machell v. Ellis*, 1 C. & K. 682; *Darby v. Ousley*, 25 L. J. 233, Ex.

⁶ *Van Wart v. Woolley*, Ry. & M. 4; *Swinfen v. Swinfen*, 26 L. J. 97, C. P.

⁷ *Colledge v. Horn*, 3 Bing. 119.

⁸ *R. v. Thornhill*, 8 C. & P. 575.

A wife has no implied authority to make admissions in prejudice of her husband's rights, even though he possess such rights *jure uxoris*.¹ Nor can her confession of a tort committed by her be given in evidence to affect her husband in an action in which he is liable for costs and damages.² Accordingly, where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him, in replevin by him against his landlord. Alderson, B., said:—"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop."³

But, whenever it can be inferred, from the antecedents of a case, that a wife had an express or implied authority, as an agent, to bind her husband, her admissions will affect him.⁴ Accordingly, in actions against a husband for goods supplied to his wife, the jury ought not only to be asked whether the goods were necessaries, but also, whether the wife had authority to buy;⁵ for a wife has no original authority to pledge her husband's credit at all.⁶

Where the business is such as is usually transacted by women, a wife's admission concerning it has been received against her husband.⁷

¹ *Alban v. Pritchett*, 6 T. R. 681.

² *Denn v. White*, 7 T. R. 112.

³ *Meredith v. Footner*, 11 M. & W. 202.

⁴ *Manby v. Scott, &c.*, 2 Sm. L. C. and notes.

⁵ *Reid v. Teakle*, 22 L. J. 161, C. P.

⁶ *Reneaux v. Teakle*, 22 L. J. 241, Ex.

⁷ *Anon.* 1 Str. 527.

Admissions by a principal are not evidence against a surety, unless connected and contemporaneous with the original transaction.¹ Thus, a surety by bond for the conduct of a clerk has been held not bound by the admissions of the clerk that he had embezzled money.² Nor, on a guarantee to pay for goods, is the surety bound by the admissions of his principal as to delivery.³ But receipts in the books of a deceased collector or clerk are evidence against a surety, as declarations in the course of business or against interest.⁴

Admissions by acts or conduct.

The assumption of character is evidence to create a liability for acting in it, and the tacit recognition of it waives objections to its validity. On this ground executors *de son tort* are liable for interfering with the property of a deceased person. Accordingly, where a person holds himself out as a physician, he cannot maintain an action for fees as a surgeon; but where, in such an action, it appeared that the defendant had paid money into court, it was held that this amounted to a recognition of the plaintiff's right to sue.⁵ So, a collector of turnpike tolls, although not legally appointed, has been held capable of maintaining an action for them on a count for an account stated, where the defendant had paid part and promised the remainder.⁶ And the title of an assignee in bankruptcy, if not formally disputed, is sufficiently established by proof that the defendant had treated with him as such.⁷ But, where the plaintiff professes to sue in a particular capacity, it must be strictly proved,

¹ 1 Phill. 393.

² *Smith v. Wittingham*, 6 C. & P. 78.

³ *Evans v. Beattie*, 1 C. & P. 394.

⁴ *Middleton v. Melton*, 10 B. & C. 317; *Whitmarsh v. George*, 8 B. & C. 556.

⁵ *Lipscombe v. Holmes*, 2 Camp. 441.

⁶ *Peacock v. Harris*, 10 East, 104.

⁷ *Dickinson v. Coward*, 1 B. & Ald. 677.

in the absence of such admission.¹ And an admission by a person in one character is no evidence against him in another. Thus, declarations by a person before becoming an executor are not evidence against him in that office.² Generally, however, it is a rule as laid down by Lord Ellenborough, that any recognition of a person standing in a given relation to others is *primâ facie*, but not conclusive, evidence against the person making the recognition, that such relation exists.³ The value of such evidence will depend also entirely on the circumstances.⁴

Conduct, manner, demeanor, or acquiescence, are also generally receivable as evidence of admissions, but subject to many qualifications. Thus, it has been said: "A declaration, in the presence of a party to a cause, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little where the party hearing it has no means of personally knowing the truth or falsehood of the statement."⁵ Where a notice of dishonour, in an action on a bill, had been put by the plaintiff's attorney into the letter-box of the defendant's attorney, and the latter, shortly after, called on the former, in consequence, as he said, of what the former had written; it was held, there was sufficient evidence for a jury of an admission that notice had been given.⁶ But a merely conditional acknowledgment of liability in such a case, in the event of a party primarily liable not paying, will not dispense with the necessity of formal notice.⁷

In settlement cases, proof that a parish has relieved for seven years has been held to be evidence that the

¹ *Collins v. Carnegie*, 1 Ad. & El. 695.

² *Legge v. Edmonds*, 25 L. J. 125, Ch.

³ 1 B. & Ald. 679.

⁴ *Ibid.*

⁵ Parke, J.: *Hayslep v. Gyne*, 1 A. & E. 163; *Neile v. Takle*, 2 C. & K. 709.

⁶ *Curlewis v. Corfield*, 1 Q. B. 814.

⁷ *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229.

pauper was settled in the parish.¹ So, evidence of relief given to a pauper residing out of the relieving parish admits a settlement.² But mere relief of casual paupers is no evidence of a settlement.³ Nor even where the relieving parish has enabled the pauper to remove to another parish.⁴

Acquiescence in an act is also evidence of an admission; but, to make it so, it has been said that it must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party.⁵ Thus, if an account be delivered and retained for any time without objection, it is presumed to be correct.⁶ So, where an account has been stated, and a bill given for the amount, the debtor cannot, in an action on the bill, impeach the charges.⁷ And an objection to one of several items in an account, without remark as to the others, is evidence of an admission that they are correct.⁸ So, in an action by a surety against his principal, the uncontradicted statement by the former to the latter, that he had paid a debt by cheque, is slight evidence of payment.⁹ A notice to quit lands, which has been served and not objected to, is evidence against the tenant that the tenancy commenced at the season of the year when the notice to quit expires.¹⁰ So, in use and occupation, payment of rent is evidence of a holding, and of its terms.¹¹

Admissions are implied from the form of pleadings;¹²

¹ *R. v. Bamsley*, 1 M. & S. 377.

² *R. v. Edwinstowe*, 8 B. & C. 671.

³ *R. v. Chatham*, 8 East, 498.

⁴ *R. v. Trowbridge*, 7 B. & C. 252.

⁵ *Tayl.* 537.

⁶ *Willis v. Jernegan*, 2 Atk. 252.

⁷ *Knox v. Whalley*, 1 Esp. 159.

⁸ *Chesman v. Court*, 2 M. & G. 307.

⁹ *Price v. Burva*, 6 W. R. 40.

¹⁰ *Thomas v. Thomas*, 2 Camp. 647.

¹¹ *Harden v. Hesketh*, 28 L. J. 137, Ex.

¹² *Boyle v. Webster*, 21 L. J. 202, Q. B.; *Hewitt v. Macquire*, 21 L. J. 30, Ex.

of judges' orders;¹ from the attornments inferred from the relation of landlord and tenant;² submission to a distress;³ and in many cases unanswered letters are evidence of the statements which they contain. But their value will depend entirely on special circumstances. The mere fact of their not having been answered will amount to no recognition of their accuracy; but they will be receivable in conjunction with subsequent statements made with reference to them by the party to whom they are addressed.⁴

Payment into court.

It is said, that payment of money into court admits everything which the plaintiff would be obliged to prove in order to recover the money.⁵ But this doctrine is controlled by later cases, which have settled that payment into court admits only a liability to the extent of the money paid on one or more of the contracts in the declaration; and it would appear that, practically, the contract must be proved.⁶

Admissions without prejudice.

An admission cannot be given in evidence against a party who has made it with a declaration or intimation that it is to be regarded as confidential, or without prejudice; nor can the answer to such a communication, even though not guarded by similar words.⁷ But it must appear distinctly, that the communication was meant to be confidential; and an offer of compromise, unaccompanied by any such qualification, is strictly receivable in the nature of an admission.⁸

¹ 14 Q. B. 202.

² *Stafford v. Till*, 4 Bing. 75.

³ *Crowley v. Vitty*, 21 L. J. 135, Ex.

⁴ *Gaskill v. Skene*, 21 L. J. 275, Q. B.

⁵ Per Cur., *Dyer v. Ashton*, 1 B. & C. 3.

⁶ *Kingham v. Robins*, 5 M. & W. 94.

⁷ *Paddock v. Forrester*, 8 M. & G. 903.

⁸ *Wallace v. Small*, M. & M. 446.

Admissions before trial.

In order to save expense and facilitate proceedings, it is now usual and right for each party, previous to trial, to call on the opposite party to make various admissions, by which the party so admitting cannot be prejudiced, and to which therefore he cannot reasonably object. These admissions are now regulated and required by the Common Law Procedure Act, 1852, which enacts that—

“Either party may call on the other party by notice to admit any document, saving all just exceptions; and, in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be; unless at the trial the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense:” (15 & 16 Vict. c. 76, s. 117.)

“An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be, in all cases, sufficient evidence of such admissions:” (s. 118.)

“An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served:” (s. 119.)

The form of notice to admit, under the 117th section, cited above, is regulated by the 29th rule of Hilary Term, 1853. And by the 30th rule of the same term, it is ordered that—

“In all cases of trials, writs of inquiry, or inquiries of any kind, either party may call on the other

party by notice, to admit documents in the manner provided by, and subject to, the provisions of the Common Law Procedure Act, 1852; and in case of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, *whatever the result of the cause may be*, unless at the trial or inquisition the judge or presiding officer shall certify that the refusal to admit was reasonable: and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense." Notice to admit must be given even when the genuineness of the document itself is in issue, and although the opposite party have intimated that the admission will not be made.¹

The form of admission under the above statute and rules is the same as that which was previously in force under the now repealed rules of Hilary Term, 4 Will. 4. Various decisions under these rules have established the principle, that a party, by admitting a document, does not thereby in any way recognise its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the court. Thus, when a party admitted his signature to a bill of exchange, he was still allowed to object to the insufficiency of the stamp.² And an admission on notice of certain documents which were described as copies of, or extracts from, certain original documents, was held not to make such copies evidence, in the absence of sufficient reason for the nonproduction of the originals.³ But an admission of a bill of exchange drawn by the plaintiff, directed to the defendants, "and accepted by one H. B. for the defendant," has been held to estop the

¹ *Spencer v. Barrough*, 9 M. & W. 425.

² *Vane v. Whittington*, 2 Dowl. (N.S.) 757.

³ *Sharp v. Lambe*, 11 A. & E. 805.

defendants from disputing H. B.'s authority to accept.¹ So it has been held that, after admission of a deed, no objection can be taken to an erasure or interlineation which may afterwards appear. In such a case, where the defendant objected at trial to an unexplained interlineation which had been admitted without objection, Coleridge, J., said :—"Before a party admits a deed it is produced to him for the very purpose of enabling him to inspect it, and say whether he objects to its admission in the form in which it appears to be written. Here it must be considered, either that the defendant really admitted that the deed was correct, and the interlineation no objection, or that the admission was made with the dishonest intention of entrapping the plaintiff; and as it must be presumed that the defendant acted upon the inspection of the deed upon which he had a right to act, I think the objection has been waived under the notice to admit."²

Where there is a variance in date between the document admitted and that which is produced, it will be immaterial, unless the opposite party have been misled by it;³ but it ought to be shown that the document admitted and that produced are the same.⁴

Finally, it is to be observed that the whole of a statement containing an admission is to be received together.⁵ It will not be inadmissible, because portions of it contain hearsay; but the fact will be matter of commentary by the judge to a jury, and he will also remind them that it is their duty to consider the whole statement, although an omission in this respect will not vitiate a verdict, if it appear that the whole admission has been otherwise brought fairly before them.⁶

¹ *Wilkes v. Hopkins*, 1 C. B. 737.

² *Freeman v. Steggal*, 19 L. J. 18, Q. B.

³ *Field v. Flemming*, 5 Dowl. 450.

⁴ *Clay v. Thackrah*, 9 C. & P. 47.

⁵ 1 Phill. 309.

⁶ *Beckham v. Osborne*, 6 M. & G. 771.

CHAPTER XVII.

ON CONFESSIONS.

As in civil controversies the admissions of parties are received against their makers, so in criminal trials the confession of a prisoner is held to be evidence against him of a high nature. But since a person charged with a crime may be induced by his situation either to criminate himself untruly, under the influence of excitement and terror, or trusting to a promise of forgiveness by a prosecutor, or other person who may be presumed to have a power of pardoning; it has long been the policy of the criminal law to reject evidence of every confession or statement by a prisoner, which has been made under the pressure of any species of physical or moral duress. Whenever, therefore, at a criminal trial, there appears to be ground of reasonable suspicion that a confession of guilt has been elicited from a prisoner by a threat of punishment, in the event of a refusal to confess, or by a promise of forgiveness, on condition of confessing, the court will inquire strictly into the antecedent circumstances of the statement which is to be tendered, and will not receive it unless it appear to have been the free and voluntary declaration of the prisoner. The rule, as now recognised, is the following:—

The statement of a prisoner as to the circumstances of a crime with which he is charged is evidence against himself, unless it have been elicited from him by a person who had at the time, actually or presumably, power to forgive; and who, in that

capacity, induced the prisoner to confess, by holding out to him an offer, or prospect of, forgiveness.

Such is the existing rule, as confirmed by the latest decisions; but it is right to observe that it must be regarded as still comparatively unsettled, and in a state of transition. There appears to be a growing conviction in the minds of many learned judges that it has been limited too much, and that it has so been made the technical instrument of excluding much valuable and unobjectionable evidence. The tendency, therefore, seems to be rather towards an extension than a contraction of the rule; and the latest authorities are remarkable for the strong language in which the judges have reprobated even the principle of its limitation.¹

In *R. v. Baldry*,² Lord Campbell, C. J., said:—"The rule seems to be this:—If there be any worldly advantage held out to the accused to be obtained by confession, or any harm threatened to him if he refuses to confess, any statement made by him in consequence of any such inducement must be rejected. The reason for this rule I take to be, not that the law supposes that what is said after such inducement is false, but that the prisoner may have said something under a bias, and that it is not a purely voluntary confession." And Pollock, C.B., in the same case, said:—"By the law of England every confession to be used against a prisoner must be a voluntary confession. Every inducement held out by a person in authority will render a confession inadmissible; and the cases have gone very far as to who are persons in authority."

Accordingly, a confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor or his wife;³ by the prisoner's master or mistress when the crime has been committed against either of them, but not otherwise;⁴ by the

¹ See *R. v. Baldry*, 21 L. J. 130, M. C.; 5 Cox Cr. Cas. 525.

² Ibid. ³ *R. v. Spencer*, 7 C. & P. 776.

⁴ *R. v. H. Moore*, 21 L. J. 199, M. C.; 5 Cox Cr. Cas. 655.

attorney of such person in authority; by a constable, or any one acting under a constable;¹ and especially by a magistrate.²

But the inducement must be held out by a person who is in authority, and who has presumably power to forgive. Accordingly, where a maid servant was indicted for child murder, a confession elicited from her by her mistress was held admissible, because the crime was in no way connected with the management of the house, and there was, therefore, no probability that the mistress or her husband would prosecute in it.³ So even when a confession is elicited by an inducement held out by a non-resident daughter of a prosecutor, it appears that she is not a person in authority competent to hold out an inducement, and that the confession is admissible.⁴

But if the inducement be made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected.⁵

When the inducement is held out by a person who has no authority in the matter, a confession will be admissible. Thus, when a prisoner's neighbours, who were not connected with the prisoner, advised her to tell the truth for the sake of her family, the confession was received.⁶

When the inducement has been once held out by a person in authority, no subsequent confession to such person will be admissible, unless it appear clear that the impression, which it was calculated to make, has been removed from the mind of the prisoner.⁷ If the

¹ *R. v. Enoch*, 5 C. & P. 535.

² *R. v. Drew*, 8 C. & P. 140.

³ *R. v. H. Moore*, 21 L. J. 199, M. C.; 5 Cox Cr. Cas. 555.

⁴ *R. v. Sleeman*, 23 L. J. 19, M. C.; 6 Cox Cr. Cas. 245.

⁵ *R. v. Luckhurst*, 23 L. J. 18, M. C.; 6 Cox Cr. Cas. 243.

⁶ *R. v. Rowe*, R. & R. 153; *R. v. Taylor*, 8 C. & P. 733.

⁷ 2 Russ. Cr. 833-5.

judge discover that a confession has been improperly received, he will strike it from his notes, and direct the jury that it is to have no weight with them.¹

Great uncertainty still prevails as to the precise words which are sufficient to exclude a confession. But a confession will generally be excluded if a prisoner be told that it will be better for him if he confess, or worse for him if he do not confess;² and the following are instances of inducement where a subsequent confession has been rejected :—

“If you do not tell me who your partner was I will commit you to prison.”³

“Tell me where the things are, and I will be favourable to you.”⁴

“If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it.”⁵

“If you do not tell me all about it, I will send for a constable.”⁶

“You had better tell all you know.”⁷

In a case at Taunton (Spring Assizes, 1855), Erle, J., held that these last words addressed by a constable to a prisoner did not exclude a subsequent confession; apparently on the ground that the inducement held out no distinct prospect of a temporal benefit. But a constable telling a prisoner, “Anything you can say in your defence we shall be ready to hear,” has been held to exclude.⁸

“It would have been better if you had told at first.”⁹

¹ *R. v. Garner*, 2 C. & K. 920.

² 2 East P. C. 659.

³ *R. v. Parratt*, 4 C. & P. 570.

⁴ *R. v. Cass*, 1 Lea. C. C. 293, n.

⁵ *R. v. Upchurch*, R. & M. 465.

⁶ *R. v. Richards*, 5 C. & P. 318.

⁷ 6 C. & P. 353.

⁸ *R. v. Morton*, 2 M. & R. 514, Coleridge, J.

⁹ *R. v. Walkley*, 6 C. & P. 175.

In *R. v. Walkley*, these words excluded ; but in a precisely similar case on the Western Circuit (Spring Assizes, 1853), Crompton, J., admitted a confession, on the ground that the words contained no present inducement to confess.

“I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing for you.”¹

“It will be best for you if you tell how it was transacted.”²

It appears that a statement made by a prisoner in expectation of a reward, and a pardon which have been offered by the Crown, is inadmissible.³

On the other hand, confessions have been received, notwithstanding the following apparent inducements :

“You had better tell the truth;” or “Be sure to tell the truth.”⁴

In *R. v. Court*, Littledale, J., said :—“It can hardly be said that telling a man to be sure to tell the truth is advising him to confess what he is really not guilty of. The object of the rule relating to confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.”

“If you will tell where the property is you shall see your wife.”⁵

A confession obtained by mere official questions, without threat or promise, is admissible.⁶

In *R. v. Baldry*,⁷ the policeman who apprehended

¹ *R. v. Partridge*, 7 C. & P. 551.

² *R. v. Warringham*, 2 Den. C. C. 447.

³ *R. v. Blackburn*, 6 Cox Cr. Cas. 333.

⁴ *R. v. Court*, 7 C. & P. 486.

⁵ *R. v. Lloyd*, 6 C. & P. 393.

⁶ *R. v. Thornton*, R. & M. 27.

⁷ 21 L. J. 130, M. C.; 5 Cox Cr. Cas. 525.

the prisoner told him, at the time of the apprehension, that "he need not say anything to criminate himself; what he did say would be taken down and used in evidence against him." The prisoner then confessed, and the Court of Criminal Appeal held that these words did not contain any inducement. So, where a magistrate, after examining witnesses, said to the prisoner, "Be sure you say nothing but the truth, or it will be taken against you and may be given in evidence against you at your trial;"¹ the confession was received. But it is the duty of a magistrate to caution the prisoner in the language prescribed by the 11 & 12 Vict. c. 42, s. 18.

It is also necessary, in order to exclude a confession, that the inducement held out should contain some promise or prospect of a temporal benefit. Accordingly, if it amount to no more than a moral or religious exhortation, it will be admitted. Thus, where a person said to a boy of fourteen, who had been apprehended on a charge of murder, "Now kneel you down by the side of me and tell me the truth;" and on the boy doing so, added, "I am now going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty;" the confession which followed was admitted by the judges.² So the words, "Do not run your soul into more sin, but tell the truth," have been held not to contain an inducement.³

A confession will not be inadmissible merely because it has been obtained by deception. Even when the prisoner has made it only on receiving a preliminary oath of secrecy from the person trusted, such person will be competent and compellable to reveal it;⁴ and a confession made by a prisoner while drunk will be received.⁵

¹ *R. v. Holmes*, 1 C. & K. 247.

² *R. v. Wild*, R. & M. C. C. R. 452.

³ *R. v. Sleeman*, 23 L. J. 19, M. C.; 6 Cox Cr. Cas. 245.

⁴ *R. v. Shaw*, 6 C. & P. 372.

⁵ *R. v. Spitsbury*, 7 C. & P. 187.

Voluntary statements made by a prisoner before a committing magistrate are strictly admissible against him, but not if taken on oath.¹ But before a magistrate asks a prisoner if he wishes to make any statement, he is bound to caution him in the language of 11 & 12 Vict. c. 42, s. 18. By that section it is provided that after the examinations of all the witnesses on the part of the prosecution shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect :—
“ Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;” and whatever the prisoner shall then say, in answer thereto, shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same : provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to any admission or confession of his guilt; but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or

¹ 1 Phill. 422.

threat; provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged. A voluntary statement by a prisoner before the depositions are complete and before the statutory caution has been given is admissible.¹

When a confession is inadmissible, every statement or act, which, presumably and reasonably, flows from it will be also inadmissible in evidence; for it is held that the influence which produces a groundless confession, may also produce groundless conduct.² But although a confession be inadmissible, a witness may be asked whether, in consequence of something which the prisoner had said, he has made any discovery of other facts which bear on the case.³

If two persons be charged jointly, the confession of one will not be evidence against the other; for a prisoner is called upon to answer depositions on oath, but not to make any answer to the statement of another prisoner.⁴ But the record of the conviction of a principal in a felony, who has pleaded guilty, is evidence against an accessory of the commission of the principal felony.⁵

On trials for conspiracy, where the conspiracy has been proved, the acts of one conspirator are evidence against the other conspirators. So it was held on Hardy's trial,⁶ that the statements in the letters addressed by one conspirator to another, are evidence against the latter.

Principals and agents are not criminally liable, as such, for their respective acts, and, therefore, cannot be

¹ *R. v. Stripp*, 25 L. J. 109, M. C.; *R. v. Sansome*, 19 L. J. 143, M. C.

² *R. v. Jenkins*, R. & R. 492.

³ *R. v. Gould*, 9 C. & P. 364.

⁴ Patteson, J.: *R. v. Swinnerton*, C. & M. 593; *R. v. Appleby*, 3 Stark. 33.

⁵ *R. v. Bleck*, 4 C. & P. 377.

⁶ 24 How. St. Tr. 475.

affected by each other's confessions. Thus, on Lord Melville's trial for embezzlement, it was held, that the admissions of his agent that the latter had received money on account of his principal only affected the principal with a civil liability, and that it could by no possibility convict him of a crime.¹ But there is an exception to this rule in the case of a libel published in a newspaper, where the proprietor is *primâ facie* liable for the insertion by his agent.²

A prisoner may be convicted on proof of a confession without other evidence; but judges are unwilling to direct a conviction in such cases. Instances are common in which prisoners, under the influence of a morbid sentiment, have confessed crimes which they have never committed; and there are others in which the confession seems to have been prompted by the full, but unfounded belief in the confessing party, that he had committed the crime. It has also been observed by Mr. Baron Parke, that "too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say."³

A confession before magistrates must be proved at trial by the depositions, unless it be clearly shown that the statement was not taken down at the time.⁴

¹ 29 How. St. Tr. 764; Sup. p. 160.

² *R. v. Gutch*, 1 M. & M. 433.

³ *Earle v. Picken*, 5 C. & P. 542, n.

⁴ 2 Russ. Cr. 825, notes.

CHAPTER XVIII.

ON THE BURDEN OF PROOF.

HAVING considered the principles by which evidence is admitted or excluded in courts of justice, we are next to consider the rules by which admissible evidence is applied to prove or disprove the issues in a cause. The first question in this inquiry is—On whom does the *onus probandi*, or burden of proof, rest, when an issue between two parties is before the court? The answer to this question includes the answer to another point, which causes frequently great controversy, as preliminary to the opening of a case, viz., which party has the privilege, or incurs the duty, of beginning? Practically, no point in the law of evidence involves more subtle principles of law; and none contains more important advantages and disadvantages, according to the circumstances, to the contending parties. Generally in legal as in social controversies, each party desires to have the last word; and as the last speaker in social circles commonly has a great superiority over a previous speaker, in the estimation of his audience, so every litigant or advocate knows from experience the value of having his view of the case the last to vibrate in the ears and memory of a court, and especially of a jury. On the other hand, cases arise frequently where the first word may be more valuable than the last; or where it is possible, by dexterity and tact, to have the double advantage of the first and the last word. Again, a plaintiff, who would otherwise contend inflexibly that it is his privilege to begin, if he should foresee that the defendant must call wit-

nesses, and so give the plaintiff a reply, will insist as inflexibly on waiving his privilege, if it should appear that the defendant does not mean to call witnesses, but to rest his case on cross-examination and the eloquence of a last appeal. But it is needless to insist on the importance which necessarily attaches to the order in which parties are allowed to state their cases to the court. It is also impossible to give any precise rule as to the cases in which it may be desirable to claim or to waive this privilege. The course of policy in this respect must depend entirely on the nature of the case; and the cultivated tact of the experienced advocate is the only safe criterion.

The general rule of law has been adopted from the civil law: *Ei incumbit probatio qui dicit, non qui negat.*¹

The issue must be proved by the party who states an affirmative; not by a party who states a negative.

In other words, it is a legal maxim that a negative cannot be proved. But this rule is subler than it is in form. Thus, a legal affirmative is by no means necessarily a grammatical affirmative; nor is a legal negative always a grammatical negative. A legal affirmative comes often in the shape of a grammatical negative; and a legal negative as often appears as a grammatical affirmative. The solution of the difficulty is to be found only in the logical doctrine of the copula, which equally ignores affirmative and negative propositions as formular conditions. No branch of our law is founded more on the old logic of the schools than that which we are now considering; and the only safe practical rule for deciding whether a pleading is affirmative or negative in character, is to disregard entirely the forms of affirmation and negation, and to ascertain strictly

¹ Dig. xxii.

which is the party who has made a substantial affirmation, which may be, not unlikely, negative in form. The second and most practical branch of the present rule, therefore, is—

The issue must be proved by the party who states the affirmative in substance, and not merely the affirmative in form.

It is the general rule that the plaintiff begins. In *Mercer v. Whall*,¹ Lord Denman said:—"It appears expedient that the judge, the jury, and the defendant himself should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff by bringing forward his case, points his attention to the proper object of the trial; and enables the defendant to meet it with the full understanding of its nature and character."

In *Amos v. Hughes*,² the plaintiff declared on a breach of contract for not embossing calico in a workmanlike manner; the defendant pleaded he did emboss in a workmanlike manner. Here the affirmative was formally with the defendant; but on a question as to the right to begin, Alderson, B., ruled for the plaintiff, and said:—"Questions of this kind are not to be decided by simply ascertaining on which side the affirmative, in point of form lies; the proper test is which party would be successful, if no evidence at all were given. Now here, supposing no evidence to be given on either side, the defendant would be entitled to the verdict; for it is not to be assumed that the work was badly executed; therefore the onus lies with the plaintiff."

¹ *Mercer v. Whall*, 5 Q. B. 447.

² 1 M. & R. 464.

The same learned judge also, in *Mills v. Barber*,¹ stated that the test would likewise be to examine whether, if the particular allegations were struck out of the plea, there would or would not be a defence to the action; and that it is quite immaterial whether the allegation be in the affirmative or negative. The party, who would fail in either event, is the proper party to begin.

And, generally, since the law will not presume a criminal or civil tort, the party alleging the commission of the act must prove it. Thus, in *Amos v. Hughes*, the court would not presume the work to have been done in an unworkmanlike manner; and in an action for putting combustible goods on board the plaintiff's ship without due notice, it was held that the plaintiff was bound to prove the negative.² So, in an action for breach of a covenant or promise to repair, if the plaintiff declare that the premises were not kept in repair, and the defendant pleaded that they were, the plaintiff must begin, and prove the non-repair.³ So, in an action by executors on a life policy, in which the declaration set out that the assured was not afflicted with rupture or any other disease at the time of assurance; and the plea stated that he was suffering from rupture at the time, and had concealed the fact; the court held, that this was a substantial affirmative on the part of the plaintiffs, and that they should have begun.⁴ So, in ejectment by a landlord, on a breach of covenant by defendant to insure premises, the burden of proof lies on the plaintiff, because the object of the action is to defeat the estate granted to a lessee.⁵

It appears, therefore, from these cases, that, since the law will not presume illegality, the burden of proof rests with the party who affirms the breach of a

¹ 1 M. & W. 427.

² *Williams v. East India Company*, 3 East, 193.

³ *Soward v. Leggatt*, 7 C. & P. 613.

⁴ *Ashby v. Bates*, 15 M. & W. 589.

⁵ *Doe v. Whitehead*, 8 A. & E. 571.

public or personal duty. Thus, since bills are presumed to be given for good consideration, it lies on the party who denies the fact to prove the negative. But if the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument; it throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it.¹ Thus, in an action by indorsee against acceptor, if the defendant plead that the bill was obtained from him by fraud, and that the plaintiff gave no consideration for it, proof of the fraud is held to throw on the plaintiff the onus of showing that he gave consideration for the bill:² for although a bill is presumed to have been given for a good consideration, yet, as soon as fraud is proved, a contrary presumption arises.³ But a mere absence of consideration will not create any such presumption.⁴ On the same principle that where an act is tainted apparently with illegality, the party justifying it must disprove its illegality; a defendant in libel, who pleads a fair report of proceedings in a court of justice, must prove the correctness of the report.⁵

There are also cases where the party who charges an illegal act cannot be called on to prove it, on the ground that the charge can be more easily refuted than it can be established. Accordingly it has been said that—

In every case the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies peculiarly within his knowledge, or of which he is reasonably cognizant.⁶

¹ *Smith v. Brain*, 20 L. J. 201, Q. B. ; *Hall v. Featherstone*, 31 L. T. 119.

² *Harvey v. Towers*, 20 L. J. 318, Ex.

³ *Berry v. Alderman*, 23 L. J. 36, C. P. ; *Mather v. Lord Maidstone*, 26 L. J. 58, C. P. ; 28 L. T. Rep. 253.

⁴ *Fitch v. Jones*, 24 L. J. 293, Q. B.

⁵ *Lewis v. Levy*, 27 L. J. 286, Q. B.

⁶ *Holroyd, J. : R. v. Burdett*, 4 B. & Ald. 140.

Thus, generally, in summary proceedings before magistrates, the defendant, who claims a qualification, and not the informer who charges the want of it, must prove the fact; for this is peculiarly within the knowledge of the former.¹ This principle has been expressly imported into the New Game Act, 1 & 2 Will. 4, c. 32, s. 42, which enacts that "it shall not be necessary, in any proceeding under that act, to negative by evidence any certificate, licence, &c., or other matter of exception or defence; but the party seeking to avail himself of such certificate shall be bound to prove the same."² But where a plaintiff claims costs under the County Court Acts, on the ground that the defendant resides out of the jurisdiction, the plaintiff must give *prima facie* evidence that such is the fact.³

In an action for goods sold and delivered, with a plea of infancy, the *onus probandi* lies upon the defendant; as the law presumes that, when a man contracts, he is of proper age to contract, until the contrary be shown.⁴ So, negligence in carriers,⁵ legitimacy of children born in wedlock,⁶ the duration of life,⁷ insanity, are all issues in which the *onus probandi* is regulated by the legal presumption as to the fact: and the party who disputes the truth of the presumption in the particular case is bound to show that it does not apply.⁸ In a late case it was held, that where a man and woman have cohabited for several years as man and wife, and separated on the same footing, the presumption that they were married is so strong that it can be rebutted only by the strongest and most distinct evidence to the contrary by the party impugning the marriage;⁹ and "modern cases have established that when the party

¹ *R. v. Turner*, 5 M. & S. 206.

² Sup. 52, cf. *Doe v. Whitehead*, 8 A. & E. 571.

³ *Stokes v. Grissell*, 23 L. J. 141, C. P.

⁴ *Hartley v. Wharton*, 11 A. & E. 934.

⁵ *Marsh v. Horne*, 5 B. & C. 322.

⁶ Tayl. § 92.

⁷ *Nepean v. Doe*, 2 Sm. L. C.; Sup. p. 57.

⁸ See *ante*, Chapter V.

⁹ *Haviland v. Mortiboy*, 32 L. T. 343, L. C.

on whom the onus lies of proving the allegation gives evidence, as consistent with one view of the case as the other, he fails in his proof."¹

Questions as to the right to begin in the superior courts, which were formerly regulated in a great measure by the pleading rules of 3 & 4 Will. 4, are now regulated by the new pleading rules of Hilary Term, 16 & 17 Vict.

It is the duty of the judge to determine which party has the right to begin; but an incorrect ruling by him will be no ground for a new trial, unless it appear to have caused substantial injustice.²

¹ Erle, J.: *Wheulton v. Hardisty*, 26 L. J. 272, Q. B.

² *Brandford v. Freeman*, 5 Ex. 734.

CHAPTER XIX.

ON THE SUBSTANCE OF THE ISSUE.

It is enough if only the substance of the issue be proved.

In other words, a party will have proved sufficiently his case if he establish substantially his allegations; and he will not be prejudiced by failing to prove matter which is unnecessary to support his claim, and which may therefore be disregarded as surplusage. Generally, allegations which are introductory and explanatory may be treated as matter of mere inducement, and consequently as surplusage.¹ But it is not every unnecessary allegation which may be treated as surplusage; for irrelevant matter may be so connected and incorporated with essential matter, as to render them legally inseparable; and where this is so the irrelevant matter must be proved.

If words which are without meaning, or which have been introduced by mistake, be inserted in pleadings, they will be struck out as surplusage at common law.² So, in tort involving a claim for a sum certain, it is immaterial that the sum due, as proved, is less than the sum claimed.³ But where a contract is stated in a declaration, unless it be truly stated, the plaintiff cannot recover. And so, if a plaintiff profess to set out a title, he must set it out correctly.⁴ It is also held, that a

¹ *Ricketts v. Saway*, 3 B. & Ald. 323.

² *King v. Pippett*, 1 T. R. 235.

³ *Gwinnett v. Phillips*, 3 T. R. 643.

⁴ Lord Kenyon: 3 T. R. 643.

contract is entire in its nature, and must be proved as laid.¹ These principles will be best illustrated by the leading case of *Bristow v. Wright*.²

That was an action by a landlord against sheriffs, for taking in execution the goods of his tenant without satisfying him for a year's rent which was due; and the declaration stated a demise for a year on reservation of a rent payable quarterly; but at the trial there was no evidence of the times of payment. It was urged that the contract was not the gist of the action, and that the plaintiff was entitled to retain a verdict, on having shown, as he had, that a year's rent was in arrear. But the court directed a judgment of nonsuit; and Lord Mansfield, in delivering it, although he had thought the plaintiff's case sufficiently established on trial, expressly abandoned that opinion. He said:—"I am convinced that it is better for the sake of justice that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded on good sense. Their objects are precision and brevity. It is easy for a party to state his cause of action. If it is founded on a deed, he need not set forth more than that part which is necessary to entitle him to recover. . . It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, and what cannot. When the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the court, and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal. For then the case declared on is different from that which

¹ Buller, J.: 3 T. R. 643.

² Dougl. 665, 1 Sm. L. C. 223.

is proved; and you must recover *secundum probata et allegata*. . . . In the present case the plaintiff undertakes to state the lease, and states it falsely." This doctrine has been further stated by Lord Ellenborough:—"With respect to what averments are necessary to be proved, I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment may be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover."¹

Accordingly, where an averment can be got rid of without injury to the pleadings, and where it can be treated as merely a statement involving needless particularity, it may be struck out in civil or criminal pleadings.² Thus, if a plaintiff, declaring on a warranty, allege a scienter, as in tort, where the plaintiff alleged that the defendant knew the goods sold to be unfit for sale, it is held that the warranty alone entitles the plaintiff to recover, without proof that the defendant knew the goods to be unfit, &c.³ So, in tort against a surgeon for mistreating the plaintiff, it has been held unnecessary to prove an averment that the defendant was employed by the plaintiff, on evidence that the plaintiff submitted to the defendant's treatment.⁴ But in contract it would be necessary, as already stated, to prove the averment.⁵

A plea of tender is proved sufficiently by evidence of tender of a larger sum than that mentioned in the plea;⁶ but if the plaintiff reply that, after the cause of action accrued, and before the tender, he demanded the sum, a demand of the precise sum tendered must

¹ *Williamson v. Allison*, 2 East, 452.

² Coleridge, J.: *Shearm v. Burnard*, 10 A. & E. 596.

³ *Williamson v. Allison*, 2 East, 446.

⁴ *Gladwell v. Steggel*, 5 Bing. N. C. 733. ⁵ *Supra*, p. 188.

⁶ *Dean v. James*, 4 B. & Ad. 546.

be proved.¹ So, a plea of payment in accord and satisfaction is proved by proof of payment of a sum sufficient to cover the plaintiff's real demand.²

In slander it is enough to prove the material words on the record : and where there are several actionable words it is enough to prove some of them.³ But it is not enough to prove merely equivalent words.⁴

In case for disturbing the plaintiff's commonable rights by putting cattle on the land, the defendant pleaded common appurtenant, and the plaintiff replied that all the said cattle were not commonable, &c. It was held that the plea was supported by proof that some of the defendant's cattle on the land were commonable, and that the plaintiff could not insist on a surcharge.⁵ But where, in trespass to a close, the defendant pleaded a licence to erect and maintain a wall on the *locus in quo*, and proved a licence to erect but not to maintain, the verdict was directed against him.⁶ And where to an action on a bill it was pleaded that it was accepted for hops, which were to be delivered according to sample, and that plaintiff had not delivered them according to sample, *nor any hops whatever*, the words in italics were struck out.⁷

It will be seen from the above cases that the doctrine as to what is, or what is not, of the substance of the issue is partly obscure and unsatisfactory ; but the large powers of amendment which judges now have, and which will be considered in the next chapter, render the question less important than it was. But since amendments are conceded *ex gratiâ*, and not *ex debito justitiæ*, it still deserves attention.

The materiality of averments is also subject to the qualifications belonging to a scilicet—the “*to wit*” of

¹ *Rivers v. Griffiths*, 5 B. & Ald. 630.

² *Falcon v. Benn*, 2 Q. B. 314.

³ *Compagnol v. Martin*, 2 W. Bl. 790.

⁴ *Lawrence, J.*: 2 East, 434.

⁵ *Brown v. Jenkins*, 6 A. & E. 911.

⁶ *Alexander v. Bonin*, 4 Bing. N. C. 799.

⁷ *Wells v. Hopkins*, 5 M. & W. 7.

pleaders. But the insertion of a *scilicet* will qualify and render it unnecessary to prove exactly, only immaterial averments which are not matter of description.¹

The rule that it is enough to prove the substance of the issue holds still more strongly in criminal than in civil cases. Thus, where a defendant was indicted for that he had composed, printed, and published a libel, only publication was proved; but Lord Ellenborough said that this warranted a conviction, and added: "If an indictment charges that a defendant did, and caused to be done, a particular act, it is enough to prove either. This distinction runs through the whole of the criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."² So, on an indictment for two connected felonies, the prisoner may be acquitted of one and convicted of the other; as, where he is charged with burglary and stealing, he may be acquitted of the burglary and convicted of the stealing, and *vice versâ*;³ or on a charge of murder, he may be convicted of manslaughter; for the unlawful killing is the substance of the charge, and the malice is only matter of aggravation.⁴ So, if a prisoner be charged with killing with a dagger, it will be sufficient if the evidence prove a killing with a stick; or if he be charged with killing with one kind of poison, and the evidence prove a killing with another. But if the charge be for killing by poison, and the evidence prove death by a weapon or a blow, this will be a fatal variance; for a prisoner cannot be expected to be prepared with evidence to refute a charge so totally distinct from that which is laid in the indictment.⁵ So, where A. is charged with giving a mortal blow; and B. and C. being present, aiding and abetting; the indict-

¹ Rosc. N. P. 69, 1 Sm. L. C. 328.

² *R. v. Hunt*, 2 Camp. 583.

³ 2 Hale P. C. 302.

⁴ *Mackalley's case*, 9 Rep. 676.

⁵ 1 Phill. 563.

ment will warrant a conviction, although the evidence prove B. to have given the blow, and A. and C. to have been present aiding and abetting ; for all are principals, and the blow is the blow of them all. But if two are charged as principals, and one appear to be only an accessory, he must be acquitted, for the legal offences in this case are different.¹

If an averment be essentially descriptive of the substantial charge, it must be proved. Thus, on an indictment for stealing live turkeys, a prisoner cannot be convicted of stealing dead turkeys.² The extensive powers of amendment which are now vested in criminal courts by the 14 & 15 Vict. c. 100, render it unnecessary to pursue this subject further.³

¹ 1 Phill. 564.

² *R. v. Edwards*, R. & R. 497.

³ See next chapter.

CHAPTER XX.

ON VARIANCES AND AMENDMENTS IN CIVIL AND
CRIMINAL PROCEEDINGS.

WHEN there appears to be a material discrepancy between the pleadings on the record and the evidence by which they are supported, the rule which requires the substance of the issue to be proved has been violated, and the party on whom the burden of proof lies must either submit to a nonsuit or an adverse verdict. In this case there is said to be a variance between the matter alleged, and the matter proved; and at common law, whenever the matter so alleged was not proved and could not be struck out, or passed over as surplusage, the consequences were those which have just been stated. This rule still remains the same; and as it was originally established to check the carelessness and laxity of pleaders, to save the time of the courts, and to prevent parties who came prepared with evidence to meet one kind of issue from being prejudiced by being suddenly called on to meet a different issue; so the rule still holds that a material variance between the issue and the evidence will be fatal to the party who is responsible for the proof of the issue. But as the operation of this rule was found to work great hardship in its original shape, even when qualified by the principles of surplusage, several statutes have been passed within the last thirty years by which, at length, almost unlimited powers of amending records are given to judges whenever they are of

opinion that the justice of the case requires such intervention.

The first of these acts (9 Geo. 4, c. 15), commonly called Lord Tenterden's Act, after reciting that—

“Great expense is often incurred, and delay or failure of justice takes place on trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case; and such record cannot now in any case be amended at the trial;” for remedy thereof enacts: “that it shall and may be lawful for every Court of Record, holding plea in civil actions, any judge sitting at Nisi Prius, and any Court of Oyer and Terminer, and general Gaol Delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, where any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending; to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly.”

This act, it will be observed, gave judges a discretionary power of amending a record at trial only where there was a variance between the record and writings, or printed matter, adduced in evidence. It was followed by the 3 & 4 Will. 4, c. 42, which, after referring in the preamble to the previous act, extends the privilege of amending in civil cases by enacting that—

"It shall be lawful for any Court of Record, holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter in any particular or particulars in the judgment of such court or judge not material to the merits, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence; to be forthwith amended by some officer of the court, or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea of the writ, as the case may be,

and returned together with the record or writ; and thereupon such papers, rolls, or other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll, or other document upon which the trial shall be had: provided, that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other orders as to them shall seem meet." It is also provided by the same act, "that the said court or judge shall and may, if he or they think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence: and thereupon such finding shall be stated on such record or document; and, notwithstanding the finding on the issue joined, the said court, or court from which the record has issued, shall, if they think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

It will be observed that, as Lord Tenterden's Act gave judges, at the trial of civil actions and misdemeanors, the power of amending a record, where there was a discrepancy between it and the written evidence which supported the pleadings; so the 3 & 4 Will. 4, c. 42, gives them power of amending where the variance is between the record and the proof, whether written or oral, of civil issues or on quo warranto or mandamus, or in any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment

of the court, not material to the merits of the case. Many cases have been decided on both these statutes; but before adverting to them it is well to notice the last statutable powers of amendment in civil cases, given by the Common Law Procedure Acts of 1852 and 1854.

The first of these statutes, after a preamble that "the power of amendment now vested in the courts and the judges thereof, is insufficient to enable them to prevent the failure of justice, by reason of mistakes and objection of form," enacts—

"It shall be lawful for the superior courts of Common Law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made:" (15 & 16 Vict. c. 76, s. 222.)

A similar provision, in nearly the same words, is found in the last Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 96, by which the superior courts and judges sitting at Nisi Prius are empowered "at all times to amend all defects and errors in any proceedings under the provisions of this act;" and it is also directed that such amendments "as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties, shall be so made, if duly applied for."

These two statutes do not appear to have had the effect of superseding the previous statutes, but they have virtually rendered them unnecessary. Since, however, the earlier statutes have not been actually repealed by the latter, it appears that cases arising under them will still be regulated by the cases which

have been decided on them ; and as the courts continue to construe them separately and collectively, it will be desirable to consider each act by itself ; and to trace the decisions on each, as nearly as possible, in their chronological order. Examples will therefore be now selected of civil and criminal cases, in which the variances would have been fatal without the statutes ; and the principles will be stated according to which the judges have exercised, or refused to exercise, their discretionary powers of amendment.

I.—AMENDMENTS IN CIVIL CASES.

9 GEO. 4, CAP. 15.

This act, which affects only variances between records and the written evidence which is offered to support them, has been said to give more discretionary power of amendment to the judge than that which is granted by the 3 & 4 Will. 4, c. 42. Tindal, C. J., speaking after the passing of the latter act, said :—"The statute of 9 Geo. 4, c. 15, which is still in force, does not restrict the power of amending to those cases only in which the defect to be amended is not material to the merits."¹ In that case the plaintiff declared that, in consideration that he had advanced certain money to B. at the defendant's request, and would continue to advance to him the further sum of 2*l.* a week for so long a period as B. should require, and also "such other sums of money as B. should from time to time require," the defendant guaranteed the repayment of the 2*l.*, and "such other sums as the plaintiff should lend and advance to B." To prove these allegations, the

¹ *Smith v. Brandram*, 2 M. & G. 244.

following letter from the defendant to plaintiff was put in, signed by the defendant :—

“SIR,—I beg you will continue to advance the loan of 2*l.* per week to Mr. Bass; and I hereby engage to repay you all moneys which you hereby advance to him, in addition to the 24*l.* which you have already advanced to him at my request.”

It was held that this evidence did not support the record; and that the defendant's guarantee was restricted to the liability for the 2*l.* a week; but it was also held that the variance was properly amended under the 9 Geo. 4, by striking out the above allegations.

In an earlier case,¹ the plaintiff declared that the defendant had promised to pay for goods delivered, by bills falling due before a specified date; and at trial he proved a written contract to pay by bills falling due *by* the specified date. This was held amendable by substituting *by* for *before* in the record. So, an error in the date² or the amount³ of a bill of exchange has been amended.

It was held that, neither under this act, nor under the 3 & 4 Will. 4, c. 42, on a plea of *nul tiel record*, could a variance be amended.⁴ But now, under the 15 & 16 Vict. c. 76, s. 222, it is held that such a variance may be amended, at least before trial, as where the declaration has stated a date wrongly,⁵ or the amount of a judgment recovered.⁶

It is also held, that the 9 Geo. 4, c. 15, applies only to cases where matter in print or writing is produced at trial. Therefore, where the variance was between the record, and oral secondary evidence of a libel, the judge held that he could not amend.⁷

¹ *Lamey v. Bishop*, 4 B. & Ad. 479.

² *Buntzing v. Scott*, 4 C. & P. 24.

³ *Saunderson v. Piper*, 7 Dowl. 632.

⁴ *Cooper v. Pennefather*, 7 C. B. 739.

⁵ *Noble v. Chapman*, 23 L. J. 56, C. P.

⁶ *Hunter v. Emmanuel*, 24 L. J. 16, C. P.

⁷ *Brookes v. Marshman*, 1 C. & M. 779.

3 & 4 WILL. 4, CAP. 42.

In *Hanbury v. Ella*,¹ shortly after the passing of this statute, the plaintiff declared on a promise by the defendant to pay for goods supplied to C., and the evidence proved only that the defendant guaranteed the payment. This was held a variance, but leave to amend was given by substituting a promise to guarantee, in the place of the promise to pay. Crowder argued against the amendment, that this was prejudicing the defendant by calling on him to disprove a totally different contract from that alleged. But the court supported the amendment, and held that the variance was not material to the merits of the case. So, in slander, where the plea was not guilty, and the declaration charged the defendant with affirming the slander; and the evidence proved only that the defendant had stated that he had heard that the substance of the slander was in circulation; the variance was amended, and Tindal, C. J., laid down the general spirit of the statute thus:—²

“I do not agree that the 23rd section of the 3 & 4 Will. 4, c. 42, is to be strictly construed. I should rather say that it ought to receive a liberal interpretation. The object of the Legislature in passing the statute being to prevent the necessity of multiplying counts, it would be unjust to tie a plaintiff down to the restrictions imposed by the new rules of pleading, if he were not at the trial to have the full benefit of the power of amendment intended to be conferred by this section. It may be difficult to give any precise meaning to the words ‘merits of the case,’ when applied to an action like the present; but they seem to intend the substantial matter which the parties come to try. The other words, ‘prejudiced in the conduct of his action’ are capable of a clearer explanation. Here, I

¹ 1 A. & E. 61.

² *Smith v. Knowelden*, 2 M. & G. 563.

cannot see how the defendant could possibly be prejudiced in his defence by allowing this amendment to be made; for any witness called in support of the plea of not guilty, might disprove the one form of expression as well as the other. If the defendant wished to plead a justification, or if he were taken by surprise, the judge was authorized to postpone the trial. It cannot be said that the defendant was prejudiced in respect of the amount of the damages, by the words laid in the declaration; for it was the words proved, which were left to the jury. It seems to me that this case is clearly within the statute, and that the amendment should be allowed, on payment of costs."

Accordingly, where the declaration stated a promise to lay out money on an annuity, and the evidence proved a promise to lay out on government security, the court held that the defendant could not be prejudiced by an amendment.¹ So, a plea to an action on a bill which sets up that it was given for a gambling consideration, may be amended by substituting the name of another game for that alleged in the plea.² In this case, Rolfe, B., stated the test of the propriety of an amendment to be this:—"Supposing the party comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended?" If so, the judge ought to allow the amendment; but not otherwise. "The only guide which a judge at *Nisi Prius* can have as to making an amendment, is that pointed out by the act, namely, whether the amendment is or is not to correct a misstatement, not material to the merits of the case, and by which the opposite party cannot have been prejudiced."³

Amendments have been allowed at trial, under this act, even when the variance involves a point on which an opposite party has previously given notice that he

¹ *Gurford v. Bagley*, 3 M. & G. 781.

² *Cooke v. Stratford*, 13 M. & W. 379.

³ *Id.* *ibid.*

shall insist, and oppose any amendment.¹ The judge in such a case will only consider whether or not the merits of the case are affected by the alteration.²

A count on a warranty that a horse was absolutely sound, has been amended by adding the words "except in one foot."³

In breach of promise of marriage, the declaration stated, that in consideration that the plaintiff would go from T. to L., and marry the defendant, the defendant promised, &c.; no evidence of the transit from T. to L. Held, that the declaration was rightly amended into a promise to go to L., and that the evidence of the consideration was sufficient.⁴

A contract to carry may be altered into a contract to transmit as a wharfinger.⁵

Where the declaration stated a demise executed by B. and L., and the evidence was that B. and L. had been parties to the deed, but that L. had died before it was executed; the court held that the record was rightly amended by striking out L.'s name.⁶

In false imprisonment, the defendant pleaded that certain property had been stolen from him by some person unknown, and had been found in the plaintiff's house; that defendant had probable cause to suspect, &c. The evidence showed a larceny by P. The plea was held to be rightly amended according to the fact.⁷

Where the variance was between the amount of goods declared for, and the amount proved to have been ordered; the court sanctioned an amendment which the judge had directed, unless the defendant's attorney would produce an affidavit that the defendant would be prejudiced by the amendment.⁸

¹ *Gayler v. Farrant*, 4 Bing. N. C. 286.

² *Whitwill v. Scheen*, 8 A. & E. 301.

³ *Hemming v. Parry*, 6 C. & P. 580.

⁴ *Harvey v. Johnston*, 17 L. J. 298, C. P.

⁵ *Parry v. Fairhurst*, 2 C. M. & R. 190.

⁶ *Gregory v. Delf*, 13 Q. B. 608.

⁷ *Pratt v. Hanbury*, 14 Q. B. 190.

⁸ *Jones v. Hutchinson*, 10 C. B. 515.

Where the contract alleged, was "to build a room, booth, or building, according to certain plans, by the 28th June, 1838," the court approved of an amendment to a contract "to place certain seats or tables, &c., to be completed four or five days before the 28th June, 1838."¹

The above are prominent examples of cases where amendments have been allowed on the ground that the variance was immaterial, and did not prejudice the opposite party. The following are instances where amendments have been refused, on the ground that the variance was material, and that the opposite party would have been prejudiced by an amendment.

AMENDMENTS REFUSED UNDER—

3 & 4 WILL. 4, CAP. 42.

When an amendment would introduce a new contract or a new breach, and so require the pleadings to be substantially remodelled, it will not be allowed.² Neither will it be granted where it would introduce an essentially new fact into the case; or import a new term into the agreement.³ The statute, in short, gives a judge no power to supply a material omission in the pleadings.⁴ Nor where there is no real answer put forward on the merits of the case; nor where an amendment would occasion a different set of issues.⁵

An amendment will be refused of a plea which is an answer to part only of a declaration.⁶ In *Boucher v.*

¹ *Ward v. Pearson*, 5 M. & W. 16.

² *Brashier v. Jackson*, 6 M. & W. 554.

³ *Boucher v. Murray*, 6 Q. B. 362.

⁴ 1 Phill. 595.

⁵ *Erskine, J., and Tindal, C.J.: Callander v. Districh*, 4 M. & G. 68.

⁶ *Ibid.*

Murray, the declaration was on a breach of guarantee, and stated that, in consideration the plaintiff would make an advance or loan to B., defendant would guarantee, &c.: plea, that plaintiff did not make the advance. The judge, according to the evidence, amended the declaration by inserting a statement that the defendant promised, in consideration that the plaintiff would procure the British and Australasian Company, in which plaintiff was a partner, to make the advance; and the plea, by a statement that the plaintiff did not procure the said bank to make the said advance. But the court held the amendment wrong, as it introduced a new term into the declaration by virtually transferring the promise of repayment from the plaintiff to the bank. So, in an action on a promissory note, the defendant pleaded another, signed by an additional party, and received in satisfaction of the first. The evidence proved the second note to have been received in satisfaction of an intermediate note, not mentioned in the plea, which had been given in satisfaction of the first. The judge amended by inserting in the plea a description of the intermediate note; but the court held he had gone too far in so doing, because the effect of the amendment was not merely to alter the description of the note in the plea, but to introduce new matter.¹

In an action for goods sold, the plea averred that the plaintiff authorized A. to trade as A. and Co., and sell the goods as his own proper goods; and then claimed a set-off due from A. The evidence disclosed an authority from the plaintiff to A. and B. to trade as A. and Co. The court held the judge right, in refusing to amend by inserting that A. and B. were authorized; and in directing the facts to be found specially.²

So, in slander, the words set out in the declaration were: "That is the man" (the defendant), "I mean:

¹ *David v. Preece*, 5 Q. B. 440.

² *Addington v. Magan*, 10 C. B. 576.

he is a thief." The evidence only went to show that the defendant had told a witness that he, the defendant, had told the plaintiff that he was a thief; and that when a third person, who imagined that the defendant meant him, asked for an explanation, the defendant then uttered the words charged in the declaration. Jervis, C. J., held the variance material; and, refusing an amendment, directed a nonsuit, on the ground that the words proved were strictly true, and merely historical.¹

If a plaintiff persist in going on when there appears to be a material variance between the declaration and the evidence, he will be nonsuited; but it seems that in such a case the judge has a discretionary power as to costs.² Where he has leave to amend, on condition of withdrawing the record, he must pay the costs of the day, although the order says nothing about them. This is an ordinary course where the judge thinks a defendant would be prejudiced by the allowance of an amendment.³

If an opportunity to amend at trial be allowed by the judge, and not acted on, the court will not grant a new trial, even though other opinions, uttered at the time by the judge, have induced counsel to refuse the offer.⁴

An amendment of a declaration will be refused if it appear probable that the variance may have prevented the defendant from pleading a good bar to the action; or if the amendment is one which might have induced the defendant to plead different pleas, or to demur.⁵

¹ *Camfield v. Bird*, 3 C. & K. 56.

² *Skinner v. London and Brighton Railway*, 4 Ex. 885.

³ *Ibid.*

⁴ *Lucas v. Beale*, 10 C. B. 739.

⁵ 1 Phill. 497.

15 & 16 VICT. CAP. 76.

Before considering the 222nd section of this act, which has been already cited,¹ it may be well to notice briefly that, by ss. 34 to 37, the courts, or a judge, have substantially powers given them, before and at trial, to amend, by adding or striking out a party, any variance that may appear by reason of the nonjoinder or misjoinder of either the plaintiffs or defendants in an action, whenever they are of opinion that injustice will not be done by such amendment; and that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage. Such amendments are to be made upon such terms as the court or judge, or other presiding officer by whom such amendment shall be made, shall think proper. Thus in use and occupation against two defendants, there being no evidence against one, Crompton, J., allowed her name to be struck out on the plaintiff agreeing to allow his claim against the other to be referred to the master.² When defendants are misjoined the name of one may be struck out at trial,³ or if judgment has been signed against him;⁴ but not after his liability has been negatived by the jury.⁵

On this section it has been decided that where there is a misjoinder of parties, the amendment ought to be applied for at trial, and cannot be made subsequently in banco under sect. 222.⁶

The 222nd section of this act is an almost unlimited expansion of the 9 Geo. 4, c. 15, and the 3 & 4 Will. 4, c. 41. The power of amendment is now only restricted by the discretion of the judge, and his sense of the

¹ *Supra*, p. 197.

² *Cooper v. Sanders*, 1 Fost. & Fin. N. P. R. 13.

³ *Johnson v. Goslett*, 25 L. J. 275, C. P.

⁴ *Greaves v. Humphreys*, 24 L. 190, Q. B.

⁵ *Wickens v. Stick*, 26 L. J. 241, Q. B.

⁶ *Robson v. Doyle*, 3 E. & B. 397.

injustice which would be inflicted on an adverse party, if he were to be required, as a matter of course, to submit to the amendments, which may be required to rectify his opponent's careless pleading. Formerly, and before this act, amendments could be allowed only in certain specified cases, and in matters not material to the merits of the case :¹ now they are allowable and grantable, not merely *ex gratiâ*, but *ex debito justitiæ* in all civil proceedings in the superior courts of common law, where "such amendments may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties :” (s. 222.)

Under this section a plea has been added by the judge at Nisi Prius; but it seems doubtful how far this course was allowable.²

The principle of this section was fully considered in *Wilkin v. Reed*.³ There, the declaration charged the defendant with having fraudulently misrepresented to the plaintiff, that the reason why he had dismissed P. (a servant whom the plaintiff engaged, on the recommendation of the plaintiff to try him), was on account of the diminution of the defendant's business; whereas he had dismissed P. on account of dishonesty. The evidence proved that P. had committed dishonest acts while in the defendant's service, and that the defendant had not communicated this fact; but that the immediate cause of the dismissal was that which had been assigned on the plaintiff's inquiry. The plaintiff applied to amend by substituting an allegation that the defendant had suppressed the fact of dishonesty, in the place of that which charged a fraudulent misrepresentation. But the court held the judge right in refusing the application, on the principle that it would entirely vary the original ground and substance of the action. Jervis, C. J., said :—

¹ *Addington v. Magan*, 20 L. J. 82, C. P.

² *Mitchell v. Crasweller*, 22 L. J. 100, C. P.

³ 23 L. J. 193, C. P.

“Amendments are to be made for the purpose of determining the real question in controversy between the parties. The question in controversy here, was whether the defendant had falsely and fraudulently represented the cause of P.’s dismissal—not whether he had been guilty of dishonesty, nor whether the defendant had recommended him, neither of which were disputed. If, therefore, the allegation as to the fraudulent representation were struck out, the only thing in dispute would be struck out.” Maule, J., said:—

“The 3 & 4 Will. 4, c. 42, allowed amendments only in matters not material to the merits of the case; and the proposed amendment, if made at all, can only be made under the Common Law Procedure Act; and that enables the judge to make ‘such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties.’ Now, what is the real question in controversy is a matter of fact, and that matter of fact is to be decided by the judge. The framers of the Common Law Procedure Act intended to extend the powers of amendment given by the act of 3 & 4 Will. 4, and which only applied to matters not material to the merits; and they provided for the determination of the real matter in issue in the suit; for there may be, and often are, cases where the real matter is, by some mistake or oversight, not raised by the pleadings. Now, under the new act in such cases, that may be put upon the record which was not put upon the record before, but which must be shown to the satisfaction of the judge to exist. Now, what was the controversy which existed in the present case, and which was not raised by the record? That there was a controversy as to the true cause of dismissal is clear; but there was no dispute as to whether Pargeter had been guilty of dishonesty; nor whether the fact of his having been guilty of dishonesty had been fraudulently suppressed. Certainly neither of these two latter questions were raised by the record; but I, as a judge, did not suppose they were ever in controversy, and therefore decided

that they ought not to be raised upon the record. It was not intended by the framers of the Common Law Procedure Act that amendments should be made to raise questions never in controversy between the parties. All questions are to be excluded, and intentionally so, except those which the parties hoped and intended to try in the cause ; and, as to them, amendments are to be made so as 'the real question in controversy' may be determined. In the present case there was nothing to show that the question sought to be raised by the proposed amendment was ever in controversy between the parties ; on the contrary, it was clear that it was never intended to be raised by the record, nor ever existed in fact."

Where the declaration was for money had and received by the defendant, with a count in trover, and the plea, after averring that the money received was due on a contract jointly with T. B., set forth a judgment in satisfaction recovered by the plaintiff in trover against T. B. ; and the evidence supported this plea, with the variance that there was proved to have been a joint conversion and sale by the defendant and T. B., but a receipt of the proceeds of the sale by the defendant alone ; it was held that the substantial question was, whether there had been such a recovery in the former action as barred the subsequent one ; and, that that having been proved, the plea was rightly amended by striking out the allegation that the debt was a joint one, and by substituting an allegation that the money was received by the defendant as the proceeds of the sale.¹ So, a judge will amend a declaration by altering an injury to possession to an injury to the reversion.²

So, where the declaration was on a breach of contract for a year's hiring ; and the evidence disclosed a usage to dismiss on three months' notice, it was held that the judge was wrong at trial in holding that there was no variance, because the usage was to be treated as

¹ *Buckland v. Johnson*, 23 L. J. 204, C. P.

² *May v. Footner*, 25 L. J. 33, Q. B.

annexed to the contract, and ought to have been stated; but it was also held that an amendment should have been allowed at trial.¹

In a declaration for injuring the plaintiff's horse by riding him improperly, an unproved averment that the defendant would not let any other person ride the horse has been struck out.²

In determining whether an amendment should be allowed, the character of the action or defence ought not to be taken into consideration. There is, however, some difference of opinion on this point.³ Whenever an amendment would raise a new point between the parties, it should not be allowed.⁴

The 222nd section does not apply to cases of misjoinder of parties; nor the 37th section to cases in which a defendant has been joined, not by mistake, but to try his liability.⁵ An amendment ought not to be allowed, if its allowance afford reasonable ground for demurrer.⁶

After allowing an amendment, it seems that a judge may allow a reamendment.⁷

A variance in a date, on a plea of *nul tiel record*, has been held amendable, before trial, under sect. 222.⁸ So, in a similar case and plea, a variance as to a sum stated has been amended.⁹

Under this act a judge has power to strike out the name of a party to the record who has allowed judgment to go by default.

No appeal lies against the refusal of an amendment by a judge at *Nisi Prius*; but the court will review such refusal, if they think it necessary.¹⁰

¹ *Metzner v. Bolton*, 23 L. J. 130, Exch.

² *Salter v. Burnaby*, 1 Fost. & Fin. N. P. R. 139.

³ *Hughes v. Bary*, 1 Fost. & Fin. N. P. R. 374, and notes.

⁴ *Adams v. Smith*, 1 Fost. & Fin. N. P. R. 311.

⁵ *Wickens v. Steel*, 26 L. J. 241, C. P.

⁶ *Martin v. Williams*, 26 L. J. 117, Ex.

⁷ *Morgan v. Pike*, 23 L. J. 64, C. P.

⁸ *Noble v. Chapman*, 23 L. J. 56, C. P.

⁹ *Hunter v. Emmanuel*, 23 L. J. 16, C. P.

¹⁰ *Brennan v. Howard*, 25 L. J. 389, Ex.

2.—ON VARIANCES AND AMENDMENTS IN CRIMINAL CASES.

The day and year on which facts are stated in an indictment to have occurred, are not, in general, material; and the facts may be proved to have occurred upon any other day previous to the finding of the bill by the grand jury.¹ So it is not generally necessary to prove the offence to have been committed at the place named in the indictment, but it is enough to show that it was committed within the county, or within the jurisdiction of the court.² Such, at least, is the rule where the offence is of a transitory nature, *e.g.*, in murder, larceny, treason, and even, it is said, in highway robbery.³

But where time or place are of the essence of the offence, they must be strictly proved. Thus, burglary may be proved to have been committed on any day prior to that which is charged in the indictment; but it must be proved to have been committed between the hours of 9 p.m. and 6 a.m.⁴ So, where place is stated as matter of local description, and not merely as venue, a variance will be fatal at common law. Thus, on indictments for burglary, housebreaking, setting fire to a dwelling-house, stealing from a dwelling-house, place is of the essence of the offence, and must be proved. So, on an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish.⁵

When there is a material variance between the offence charged and the offence proved, it is fatal unless amended. But if the variance be only a matter of value or aggravation, and does not vary the species

¹ Wels. Cr. Pr.

² Ibid. 170.

³ 1 Phill. 601.

⁴ 7 Will. 4, c. 86, s. 4.

⁵ Wels. Cr. Pr. 170.

of the charge, the variance is in many cases immaterial, either at common law or by statute. Thus, in murder, the homicide is the substance of the crime; and the malice, which distinguishes it from manslaughter and justifiable or excusable homicide, is merely matter of aggravation, which does not vary the essence of the charge, and cannot therefore mislead a prisoner in his defence. Accordingly, on an indictment for the higher offence, he may be convicted of either of the lower offences. So, in larceny, it is sufficient to prove the species of the goods stolen to correspond with the description in the indictment, without proving the amount or the value to be the same. Thus, on an indictment for stealing eight pairs of shoes of the value of 4*l.*, two waistcoats of the value of 30*s.*, and three coats of the value of 5*l.*, it is not necessary, in either case, to prove the value of any of the articles to be more than nominal, nor to prove the number of the goods assigned to each species, nor the accumulative number of the different species. A conviction will be warranted by evidence that any one article, of any value, of any one distinct species, has been stolen. But a prisoner charged with one kind of felony or misdemeanor cannot be convicted of another kind of felony or misdemeanor; still less, when he is indicted for a felony, can he be convicted of a misdemeanor; nor when indicted for a misdemeanor can he be convicted of a felony. Thus, a prisoner charged with housebreaking cannot be convicted of burglary; and when charged with stealing boots or a coat, he cannot be found guilty of stealing shoes or a waistcoat. So, when there is a variance in the name of the person against whom the offence is committed, it is fatal at common law, unless the name be *idem sonans*.

But, although the variances which are fatal at first sight, in criminal cases, are still numberless, yet practically their amount is reduced to a very narrow compass by the extensive powers of amendment which different statutes, as in civil cases, have vested in the judge at

trial. The most recent one, and the only one which need be considered here, as it virtually includes many which preceded it, is the 14 & 15 Vict. c. 100.

By this act, after reciting that “offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case ; and that such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence ; and that a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters and circumstances therein mentioned not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his own defence,” —it is enacted as follows :—

“From and after the coming of this act into operation, whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment; or in the name or description of any person or persons, or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein ; or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence; or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever; or in the name or description of any matter or thing whatsoever therein named or described ; or in the ownership of any property named or described therein; it shall and may be lawful for the court, before which

the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof, by some officer of the court, or other person, both in that part of the indictment wherein such variance occurs, and in every other part of the indictment which it may become necessary to amend; on such terms as to postponing the trial, to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: provided, that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively; and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall

be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

Sect. 2.—"Every verdict and judgment which shall be given after the making of any amendment under the provisions of this act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made."

By the interpretation clause of this act (s. 30), the word "indictment" is declared to include an "information," "inquisition," "presentment," and "also any plea, replication or other pleading, and any Nisi Prius record." Consequently, in all these cases amendments will be allowed.

Under sect. 1 of this act, the ownership of property in larceny may be altered at trial. Where the indictment was for stealing the goods of C.; and the proof was that D. was a special bailee of similar property belonging to C. and B. severally, and had delivered by mistake the goods in question to the prisoner as belonging to C., although they really belonged to B.; the court supported an amendment which laid the property in D.¹ It is doubtful, however, whether, in every case, the power of amendment at trial extends so far as to allow a charge of stealing goods from A. B., to be converted into a charge of stealing them from C. D. In an Irish case² such an amendment has been allowed even after the prisoner's counsel had addressed the jury; and the ruling of Williams, J., in *R. v. Rymer*³ was disapproved. Where such an amendment was not made, the court, without deciding whether it might have been made, held that an acquittal on a charge of stealing goods from A. B. would not

¹ *R. v. Vincent*, 5 Cox Crim. Cas. 537.

² *R. v. Fullarton*, 6 Cox Crim. Cas. 194.

³ *Infra*, p. 218.

sustain a plea of *autrefois acquit* on a charge against the prisoner of stealing the same goods from C. D.¹

In perjury alleged to have been committed on the trial of B., "for setting fire to the barn of P.," the certificate of the trial and conviction of B. stated it to be "for setting fire to a stack of barley." It appeared that the barn and stack of barley were burning at the same time; and Williams, J., directed the indictment to be amended according to the certificate, considering the case within the words of sect. 1, "in the name or description of any matter or thing whatsoever," and observing that this was one of the very cases for which the statute was passed.²

But where the prisoner was charged with obtaining money on a false pretence that he had served an order of affiliation on A., which he had not served; and the evidence proved only a statement by him that he had left it with a third person for A.; Greaves, Q. C., after consulting Platt, B., held this a material variance which could not be amended under the words of the section cited above by Williams, J.³ So, where the indictment charged the concealment of a birth by placing the body in and among a heap of carrots, and the evidence was that it was placed on the back of the heap, Crompton, J., held the variance material, and refused an amendment.⁴ A material omission in an indictment cannot be supplied. Thus, on a charge of perjury an omission to state a material allegation in the indictment is a defect of substance, and not of form, which ought not to be amended.⁵

If the evidence prove a variance as to the Christian name of a person named in an indictment as matter of description, the court may amend by striking out all the names; but not by striking out merely some of the

¹ *R. v. Green*. 26 L. J. 17, M. C.

² *R. v. Neville*, 6 Cox Crim. Cas. 69.

³ *R. v. Bailey*, 6 Cox Crim. Cas. 29.

⁴ 6 Cox Crim. Cas. 391.

⁵ *R. v. Harvey*, 8 Cox C. C. 102, per Byles, J.

names which have been inserted, and not proved; Where the indictment charged an assault on a game-keeper of George William Frederic Charles, Duke of Cambridge; and the first two names alone were proved; it was held that the Court of Quarter Sessions might have amended by striking out all the names except that of "Duke of Cambridge," but that they were not bound so to amend; and that therefore the allegations, although unnecessary, ought to have been proved.¹

The 9th section of this act enacts that a prisoner charged with a felony may be convicted of an attempt to commit a felony, if it shall appear on the evidence that he did not complete the offence charged; and in like manner, if charged with a misdemeanor, he may be convicted of an attempt to commit a misdemeanor. The 11th section enacts, that on an indictment for robbery, the prisoner may be found guilty of an assault with intent to rob.

The 12th section enacts, that if on a trial for misdemeanor the evidence prove a felony, the prisoner may, notwithstanding, either be convicted of the misdemeanor and plead this conviction in bar of a subsequent trial, for the same offence, on a charge of felony; or the court may discharge the jury from giving a verdict, and direct the prisoner to be indicted for the felony. Previously, by the 7 & 8 Geo. 4, c. 29, s. 53, on a charge for obtaining goods by false pretences, a prisoner might be convicted, notwithstanding the evidence proved a taking which amounted to larceny. But, on a charge of larceny, a conviction cannot be had for obtaining goods by false pretences.

The 13th section, after noticing the subtle distinction between the legal crimes of larceny and embezzlement by a servant or clerk, enacts, that if on an indictment for the one crime the evidence should bring it within the legal definition of the other, the jury may convict of whichever crime the evidence establishes.

¹ *R. v. Frost*, 24 L. J. 116, M. C.

The 14th section allows prisoners charged with a joint receipt of stolen property, to be convicted severally of a separate receipt.

The object of this act, as stated by its author, Lord Campbell, C. J., is held "to apply to all cases where amendments may be made in furtherance of justice, and where the defendant cannot be prejudiced in his defence, on the merits, by such amendment."¹

It has been ruled that an amendment will not be allowed after the counsel for the prisoner has addressed the jury. The proper course is that, where the counsel for the prosecution has given all the evidence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case; and then, if the amendment be allowed, the counsel for the prisoner addresses the jury on the indictment as it is amended.²

The effect of the 14 & 15 Vict. c. 100, has been virtually to abolish the multitude of technical subtleties, which were formerly the means of defeating justice, and procuring unreasonable verdicts of acquittal, after the substance of the charge had been proved. The responsibility of letting loose on society a criminal, of whose guilt no reasonable auditor has entertained a doubt, no longer rests with the shortcomings of the Legislature, but with the discretion of the judge; and, as it is his duty to amend a defective indictment, when the prisoner cannot fairly complain that he is required suddenly to meet a charge for which he is not prepared, so it is equally the duty of a judge not to endanger the liberty of the subject, nor to encourage the carelessness of prosecutors, by permitting the form of an indictment to be altered substantially from what it was when the prisoner was called on to plead to it. On this head, it has been said by a learned writer, that no general rule can be laid down for the guidance

¹ *R. v. Sturge*, 23 L. J. 172, M. C.

² *Vide Williams, J.: R. v. Rymer*, 3 C. & K. 326, *sed vide supra*, p. 215.

of the court in all cases. It is very possible that an amendment which in one case might not prejudice a prisoner, might in another case prejudice him materially.¹ The inclination of the court will still be *in favorem vitæ*. The court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment;² and will not forget that the protection of the weak from oppression, and of the presumptively innocent from injustice, are higher objects, even in the estimation of positive law, than the detection and punishment of the guilty.

¹ Lord Campbell's Acts, by Greaves, p. 5.

² Ibid. p. 8.

CHAPTER XXI.

ON THE RELEVANCY OF EVIDENCE.

As it is the object of pleading to reduce the case of each litigating party to one or more substantial issues which involve the merits of the question; and as for this purpose none but material allegations which tend to the raising of such issues are admissible; so it is the object of evidence to provide that, when such allegations have been made, and such issues selected, they shall be supported by strictly relevant proof. It is impossible to define the distinction between relevant and irrelevant evidence, and even the cases illustrate the difference unsatisfactorily. In the case of direct evidence, there is little difficulty in drawing the practical line; but, since a large proportion of evidence is of a presumptive or circumstantial character, it requires the keenest perspicacity to distinguish between legitimate presumption and irrelevant hypothesis; and it is in observing this appreciable, but indescribable distinction, that the sense and wariness of an able judge especially appear. The rule is that—

The evidence must correspond with the allegations, and be confined to the points in issue.¹

It is a fundamental principle that no credible presumption as to the conduct, intention, or course of

¹ Greenl. 58; Tayl. 194.

dealing between two parties can be derived from proof of the conduct, intention, or course of dealing between one of them and a third party. Such evidence is said to be *res inter alios acta*, and will be rejected as irrelevant to the issue. The fact that A. contracted, or dealt in a particular manner with B., is no evidence that he meant to contract, or deal in the same manner, with C. Thus in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff has sold the same quality of goods to other persons on the same terms;¹ for "the fact that a man has once or more acted in a particular way does not make it probable that he so acted on a given occasion. The admission of such evidence would be fraught with the greatest inconvenience. Where, indeed, the question is one of guilty knowledge or intent, as in cases of uttering forged documents or base coin, such evidence is admissible as tending to establish a necessary ingredient of the crime."²

Thus, in an action by a brewer against a publican, where the issue was as to the quality of beer supplied by the former to the latter, Lord Ellenborough refused to let the plaintiff call witnesses to show that he supplied them, at the time in question, with good beer, His Lordship said:—"This is *res inter alios acta*. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one, and not with the others. Let him call some of those who frequented the defendant's house, and there drank the beer which he sent in; let him give any other evidence of the quality of the beer; but I cannot admit witnesses to his general character and habits as a brewer."³ Hence, where the

¹ *Hollingham v. Head*, 27 L. J. 241, C. P.

² *Ibid* per. Cur.

³ *Holcombe v. Hewson*, 2 Camp. 391.

issue was whether the plaintiff, a tradesman, had given credit to A.'s father, evidence that other tradesmen had given credit to the father was rejected.¹ So, evidence of the treatment of scholars at one school is no evidence of the quality of their treatment at another school;² and where the action was for withdrawing scholars without a quarter's notice, according to a prospectus of terms, which the defendant was proved to have received, it was held, that a witness might state that she had never received any prospectus while her children had been at the school; because this evidence bore on the usual course of the plaintiff's dealing: but that she could not prove that she had taken her children away without notice, and without being called on to pay a quarter's salary; apparently because this might have been merely a matter of peculiar arrangement.³ So, the terms on which one tenant holds are no evidence of the terms on which another tenant holds under the same landlord;⁴ and an award in favour of a party to a former action is not evidence for a party to a subsequent action, claiming by paramount title, as against a party claiming through the person against whom the award was made.⁵ So, on the trial of an indictment for carrying on a noxious trade, a previous summary conviction for a similar offence is inadmissible.⁶

But where the extraneous transaction contains the principle of a reasonable and credible inference as to the motive or conduct of the party, the judge, in his discretion, will admit evidence of it. Thus, in false imprisonment on a charge of felony, where the defence is a *bonâ fide* belief that the defendant had committed felony, the defendant may show that he had previously

¹ *Smith v. Wilkins*, 6 C. & P. 180.

² *Boldron v. Widdows*, 1 C. & P. 59.

³ *Delamotte v. Lane*, 9 C. & P. 261.

⁴ *Carter v. Pryke*, Peake, 95.

⁵ *Lady Wenman v. Mackenzie*, 25 L. J. 44, Q. B.

⁶ *R. v. Fairrie*, 30 L. T. 131.

done acts which go to establish the presumption of *bonâ fides*.¹ So, on a charge of uttering counterfeit coin, a guilty knowledge may be proved by evidence either of a previous or subsequent uttering of another description of counterfeit coin.²

The customs of one manor are not evidence of the customs of another manor,³ unless a connection between them be first established, as by showing that they belong to the same lord, that the same description of tenants has existed in each, and that their leases have been granted in the same terms. In such a case, the usage which has prevailed in one part, and which is therefore evidence to explain the meaning of a grant there, is evidence to explain a grant expressed in similar terms as to any other part of the district.⁴ But the unity or original identity of the manors must be clearly shown; and the mere fact of their being in the same leet, or parish, is not sufficient.⁵

A custom of trade may be proved by showing what is the custom of the same trade in a different place. Thus, evidence of the custom of fisheries off Newfoundland, is evidence of the custom of similar fisheries off the coast of Labrador.⁶

When the issue involves a question of manorial right as between a lord and an adverse claimant, evidence of the exercise of such right over part of a waste has been held to be evidence of title to other parts which, from their local situation, may be deemed to belong to it. Thus, in the Exchequer Chamber, on a question whether a piece of waste land, between a highway and the plaintiff's inclosure, belonged to the plaintiff, or to the lord of the manor, it was held that the latter might support his claim by evidence of

¹ *Thomas v. Russell*, 23 L. J. 233, Exch.

² *Reg. v. Foster*, 25 L. T. 119.

³ *Marquis of Anglesea v. Lord Hatherton*, 10 M. & W. 233.

⁴ Bayley, J.: *Rowe v. Brenton*, 8 B. & C. 764.

⁵ Lord Abinger, 10 M. & W. 236.

⁶ *Noble v. Kennaway*, 2 Doug. 510.

grants of similar pieces between the same road and the inclosure of other persons. Lord Denman said:—
“ If the lord has a right to one piece of waste, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway. Assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises, from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with regard to those parcels which, from their local situation, may be deemed part of one waste or common; acts of ownership, in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common.”¹

In all these cases it will be observed, that the act between third parties, which has, nevertheless, been received, has been either connected presumptively with the party who is to be affected by it, or has been invested with a *primâ facie* credibility by evidence of an original unity of nature or title. In short, it seems to be a safe general rule in these cases, that transactions with third parties are inadmissible, unless their privity or connection with the party against whom they are tendered be first proved extrinsically, so as to make such intermediate transactions operate in the nature of an admission or estoppel.² Unless

¹ *Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102; cf. *Dendy v. Simpson*, 27 L. T. 288.

² See *Maule and Bosanquet*, JJ., 1 M. & G. 614; *Petrie v. Nuttall*, 25 L. J. 200, Ex.

this be done, it will be the duty of the judge to reject the evidence, or to strike it from his notes.¹

Evidence of good or bad character is generally irrelevant and inadmissible in civil cases, unless character be of the substance of the issue.² In actions for seduction, evidence of the real plaintiff's bad character is admitted in reduction of damages; but the evidence must refer to a time prior to that when the seduction took place.³

In actions for defamation, evidence of the plaintiff's general good character is held irrelevant, even on a plea of justification.⁴ But in such cases, the plaintiff may give in evidence any words, as well as any act, of the defendant, to show the malice or animus of the words which are the subject of the action.⁵ But the mere abandonment of a plea of justification ought not to weigh with a jury, where the actual defence sets up only a privileged communication.⁶ And where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had, at other times, acted competently in that capacity.⁷

In criminal cases the rule is observed with the utmost strictness, that no evidence shall be admitted which does not tend directly to the proof, or disproof, of the matter in issue.⁸ Thus, evidence that a prisoner has committed a similar crime before, or that he has a disposition to commit such crimes, is inadmissible.⁹ On a charge of burglary and larceny on a particular day, evidence of a larceny in the same house on a previous day was rejected.¹⁰ But, as stated already,¹¹

¹ Ibid.

² 1 Phill. 502.

³ *Elsam v. Faucett*, 2 Esp. 563.

⁴ *Cornwall v. Richardson*, R. & M. 305.

⁵ *Pearson v. Lemaitre*, 5 M. & G. 700.

⁶ *Wilson v. Robinson*, 7 Q. B. 68.

⁷ *Brine v. Razalgetti*, 3 Exch. 692.

⁸ Wels. Cr. Pr. 183.

⁹ *R. v. Cole*, 1 Phill. Ev. 508.

¹⁰ *R. v. Vandercomb*, 2 Lea. C. C. 816.

¹¹ Sup. p. 223.

when the animus of an act has to be shown, previous and subsequent conduct will be evidence of it. Thus, the animus in uttering counterfeit coin may be proved by evidence of previous utterings; and the possession alone of several pieces of counterfeit coin is evidence of guilty knowledge.¹ So, when several felonies are so connected as to form one transaction, evidence of all may be given in order to convict of one. Thus, where the indictment charged stealing from the prosecutor's till; and the evidence showed different takings, by which the whole deficit was caused; it was held that the fact might be shown by proof of the results of different inspections of the till.² So in conspiracies, since the act of one is in law the act of all, when complicity has been proved, the act of one conspirator is evidence on an indictment against another.³

In larceny, to prove the identity of the prisoner, it may be shown that other goods not included in the indictment, which were stolen at the same time, were found in his possession.⁴

On the trial of Hunt,⁵ for riot and conspiracy, resolutions passed at a meeting, prior and avowedly preliminary to that named in the indictment, were held to be relevant evidence to show the objects of the second meeting. So, the general conduct of the members on their way to it, their military order and threatening language to people on the road, were held strictly relevant to show the character of the meeting. On the other hand, it was held that the defendant could not go into evidence of the conduct of the military who dispersed the meeting, because that could have no bearing upon the intention and object of the assembly, as these must have existed before the dispersion, and were in their nature perfectly distinct from the conduct

¹ *R. v. Jarvis*, 7 Cox Cr. Cas. 53.

² *R. v. Ellis*, 6 B. & C. 145.

³ *Supra*, p. 92.

⁴ 2 Wels. Cr. Pr. 184.

⁵ 3 B. & A. 566.

of those who dispersed the assembly. On the substantial facts of the case, Abbott, C. J., said:—

“The case submitted to the jury by the present indictment presented two questions. First, the general character of the assembly, as in all cases of conspiracy or other unlawful acts in which many persons are concerned. And, secondly, the particular case of each individual charged, as connected with the general character, supposing the general character to be such as that its criminality might, in the result, be a fit matter for the consideration of the jury. Now it was shown that a very considerable part of the persons assembled, or, at least, a very considerable part of those who came from a distance, went to the place of meeting in bodies, to a certain extent arranged and organized; and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury. And if this appearance was in itself proper for the consideration of the jury, it must have been proper to show to them that, at the very place from which one of these bodies came, a number of persons had assembled before daybreak, and had been formed and instructed to march as soon as there was light enough for such an operation; and that some of the persons thus assembled had grossly illtreated two others whom they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a king’s man again, or to name the name of a king; and that another of the bodies that went to the place of meeting expressed their hatred towards this person, by hissing as they passed his door. These matters were in my opinion unquestionably competent evidence upon the general character and intention of the meeting. Their effect as to each particular defendant was, as I have already observed, a distinct matter for the consideration of the jury.”

The principles according to which the relevancy and irrelevancy of evidence are distinguished have

been now explained. They are co-extensive and identical with the principles of presumptive evidence; and, in fact, embrace the whole subject of legal evidence. It is equally a condition of direct as of presumptive evidence, that it should be relevant to the issue; and it is pre-eminently the duty of a judge to admit no evidence which he does not consider to be relevant, either as direct proof, or as the ground of legitimate inference. In many cases, as in the principal issues in civil cases, the relevancy of evidence has been defined by the amount of proof which is usually given and required to support them. In criminal cases, where practically there is no issue but the general issue, the line of demarcation has been drawn less distinctly; and the discretion of the judge requires, therefore, to be exercised with proportionable vigilance.

CHAPTER XXII.

ON THE GENERAL ISSUE.

It is the province rather of pleading than of evidence to determine the nature of the evidence which a party to an action is required or allowed to give under a general or special issue. The nature of such evidence under special issues is beyond the limits of this work; but, as a sequel to a series of chapters in which the burden of proof and the relevancy of evidence have been considered, it may be useful to trace in outline the applicability of these principles to the simplest and widest form of traverse, viz., the general issue. In the superior courts of common law the new pleading rules of Hilary Term, 1853, have established certain principles under this head in actions of contract and tort, which will be now stated briefly; and the same principles apply substantially to county and other inferior courts.

1. *Contracts.*

“In all actions of simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matter of fact from which the contract, promise, or agreement alleged may be implied by law.”¹

¹ Reg. H. T. 1853, r. 6.

The following illustrations of this rule are then given:—

“*E. g.* In an action on a warranty such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss or of the alleged compliance with warranties.

“In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.”

This plea, which is confined chiefly to special declarations on promises, puts in issue the promise, the alleged consideration for the promise,¹ and every fact from which an implied contract may be inferred;² but not the performance of a condition precedent, when the consideration of the promise is executory, nor any matter of inducement extraneous to the consideration; nor does it deny the defendant's breach of promise, nor the plaintiff's consequent damage.³ Thus on non assumpsit on an action for a warranty of a horse the defendant cannot show that the horse was sound; for that would be a traverse of the breach, which cannot be disproved under a general traverse, which only professes to show that no contract ever existed as alleged.⁴ So in an action on a guarantee described as a guarantee in writing, the defendant under the general issue cannot show that the instrument was under seal.⁵ Such a defence ought to be pleaded specially.

“To causes of action to which the plea of ‘never was indebted’ is applicable, as provided in Schedule

¹ *Beech v. White*, 12 A. & E. 668.

² *Taverner v. Little*, 5 Bing. N. C. 686.

³ *Tayl.* § 243.

⁴ *Smith v. Parsons*, 8 C. & P. 199.

⁵ *Davidson v. Cooper*, 11 M. & W. 778.

B (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises; *e. g.*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale; or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff."¹

The causes of action referred to in this rule, and to which non assumpsit cannot be pleaded, are for work done, money lent, paid, received, found to be due on an account stated, estates sold, goodwill sold, use of houses or land, use of fishing, copyhold fines, hire of goods, freight, demurrage, and similar grounds.² The defendant may show that no debt ever existed; and the plaintiff must give evidence, and only such evidence as tends to prove the existence of the debt. Thus on an action for *goods sold and delivered*, the defendant may show that they were sold on credit, which had not expired when the action was commenced;³ or under a condition which failed;⁴ or that they did not correspond with the description.⁵ In *work and labour*, that the work was badly done and valueless.⁶ In *money lent*, that the alleged loan was a gift.⁷ In *money had and received*, as in the rule above. On *an account stated*, the plaintiff must prove a precise sum to have been admitted by the defendant as due;⁸

¹ Reg. Hil. T. 1853, r. 6.

² 15 & 16 Vict. c. 76, Sch. B. 1-14.

³ *Broomfield v. Smith*, 1 M. & W. 542.

⁴ *Grounsell v. Lamb*, 1 M. & W. 352.

⁵ *Gompertz v. Bartlett*, 2 E. & B. 849.

⁶ *Hayselden v. Staff*, 1 A. & E. 153.

⁷ *Worrall v. Grayson*, 1 M. & W. 166.

⁸ *Lane v. Hill*, 21 L. J. 318, Q. B.

and the defendant under the general issue may show the account to have been incorrect.¹ In *use and occupation*, the defendant may give evidence of any fact which proves that he never so occupied the premises as to render him legally liable to pay rent;² *e. g.*, that he was actually or constructively evicted.³

"In all actions upon bills of exchange and promissory notes, the plea of 'non assumpsit' and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note."⁴

Under the plea that the defendant did not make the note or accept the bill, he cannot show that it has been altered subsequently.⁵ Under a traverse of the acceptance, indorsement, &c., it may be shown that the acceptor, &c., did not intend or had no authority to accept or transfer.⁶ A plea denying the indorsement puts in issue not only the fact of the signature, but also a delivery with intent to transfer the bill;⁷ or it may be shown that a condition precedent to its vesting has not been complied with.⁸

"In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *e. g.*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation,

¹ *Thomas v. Hawkes*, 8 M. & W. 140.

² *Smith v. Marrable*, 11 M. & W. 5.

³ *Upton v. Townend*, 25 L. J. 45, C. P.

⁴ Reg. Hil. T. 1853, r. 7.

⁵ *Parry v. Nicholson*, 13 M. & W. 778.

⁶ *Jones v. Corbett*, 2 Q. B. 828.

⁷ *Marston v. Allen*, 8 M. & W. 494.

⁸ *Bill v. Lord Ingestre*, 12 Q. B. 317.

set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.”¹

This rule contains the principle, and illustrations of the principle, by which evidence is rejected when offered under the general issue in actions of contract. Every defence which professes to show not that a contract never existed, but that it has been discharged, or that it is legally voidable, must be pleaded specially and proved as an affirmative issue by the defendant.

“In actions on specialties and covenants, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only ; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.”²

“The plea of nil debet shall not be allowed in any action.”³

“All matters in confession and avoidance shall be pleaded specially as above directed in actions on simple contracts.”⁴

“In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set off of such sum or sums of money.

“But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance,

¹ Reg. Hil. T. 1853, r. 8.

² Ibid. r. 10.

³ Ibid. r. 11.

⁴ Ibid. r. 12.

without giving credit for any particular sum or sums; or to cases of set off where the plaintiff does not state the particulars of such set off."¹

"Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar."²

"In actions for detaining goods, the plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea."³

If the defendant claim any right to detain the goods he must plead specially, and cannot prove any such right under the general issue.⁴

2. *Torts.*

"In actions for torts the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *E. g.*, in an action for nuisance to the occupation of a house by the carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

"In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

"In an action for slander in his office, profession, or trade, the plea of not guilty will operate in denial

¹ Reg. Hil. T. 1853, r. 13.

² Ibid. r. 14.

³ Ibid. r. 15.

⁴ *Mason v. Farnell*, 12 M. & W. 674.

of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged.

“In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

“In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.”¹

The general issue in these cases admits the facts stated in the inducement or introduction to the substantial ground of action, and denies only the fact alleged to have been done wrongfully, and not the wrongfulness of the fact.² In other words, it denies only the fact complained of and not its nature.³ Thus in an action for obstructing light it denies only the fact of obstruction; and the defendant cannot (under this plea) show either that the plaintiff has no right to the easement, or that the defendant has a right which supersedes it.⁴ So, where the declaration alleges that the defendant, being possessed of a cart and horse, drove negligently against the plaintiff's horse, the defendant, under not guilty, cannot show that he was not the person driving, nor that the cart did not belong to him; for the plea admits these two facts, and denies only the fact of the collision, and also the alleged negligence.⁵ So, generally, in actions for negligence,

¹ Reg. Hil. T. 1858, r. 16.

² *Frankson v. Lord Falmouth*, 2 A. & E. 452; Per cur.: *Renshaw v. Bean*, 21 L. J. 219, Q. B.

³ *Ibid.*

⁴ *Renshaw v. Bean*, sup.

⁵ *Taverner v. Little*, 5 Bing. N. C. 678.

the defendant, under not guilty, may show that the damage was caused either wholly or partly by the fault of the plaintiff;¹ or that it was the result of inevitable accident.² For this plea denies all the facts which give a tortious character to the act and constitute the injury, and which are not merely matter of recital.³ Thus, in an action for indicting the plaintiff maliciously and without probable cause, the defendant may prove probable cause under the general issue;⁴ or for keeping a mischievous dog, that he did not know it to be mischievous; for the scienter is of the substance of the action.⁵ So in actions of slander or libel, not guilty puts in issue the publication, the malice, and the alleged defamatory meaning of the slander or libel;⁶ and the defendant may prove any facts which tend to show that the communication was privileged.⁷

“All matters in confession and avoidance shall be pleaded specially as in actions or contract.”⁸

The rules applicable to the proof of affirmative pleadings in contract will be applicable equally to the proof of affirmative pleadings in tort.

“In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned; but not as a denial of the plaintiff’s possession or right of possession of that place, which, if intended to be denied, must be traversed specially.”⁹

“In actions for taking, damaging, or converting the plaintiff’s goods, the plea of not guilty shall operate as a denial of the defendant’s having committed the

¹ *Tuff v. Warman*, 27 L. J. 322, C. P. ; Sc. Cam.

² *Hall v. Fearnley*, 3 Q. B. 919.

³ *Tayl.* § 279.

⁴ *Cotton v. Browne*, 3 A. & E. 312.

⁵ *Thomas v. Morgan*, 2 C. M. & R. 496.

⁶ 15 & 16 Vict. c. 76, s. 61.

⁷ *Harrison v. Bush*, 25 L. J. 25, Q. B.

⁸ *Reg. Hil. T.* 1853, r. 17.

⁹ *Ibid.* r. 19.

wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein."¹

Under this issue the defendant cannot raise any claim of title.² The plea admits the plaintiff's title, and denies only the fact that he has been deprived of his goods, and the circumstances which make the deprivation wrongful.³ A plea of not possessed denies the plaintiff's possession and property in the goods.⁴

In some cases a defendant is empowered by act of Parliament to plead the general issue and to give in evidence special matter, which, except for the statutory privileges, could not be so given, but would have to be pleaded specially. In order that he may have the benefit of this privilege a defendant must attend to the following rule :—

“In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of Parliament, he shall insert in the margin of the plea the words ‘by statute,’ together with the year or years of the reign in which the act or acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the *Nisi Prius* record.”⁵

Under this plea the defendant may give in evidence every defence arising under the statute, and every other defence at common law.⁶ Thus, in an action for excessive distress under 11 Geo. 2, c. 19, s. 21, this plea puts in issue not only the matter of justification,

¹ Reg. Hil. T. 1853, r. 20.

² *Jones v. Davies*, 6 Exch. 663.

³ *Young v. Cooper*, 6 Ex. 259.

⁴ *Harrison v. Dixon*, 12 M. & W. 142.

⁵ Reg. Hil. T. 1853, r. 21.

⁶ *Ross v. Clifton*, 11 A. & E. 631.

but the tenancy and ownership of the goods.¹ So the clerk of a county court against whom trespass is brought may give special matter in evidence under not guilty by statute under 13 & 14 Vict. c. 61, s. 19.²

On criminal charges the plea of not guilty puts in issue every fact and circumstance constituting the offence, and compels the prosecutor to prove them. The defendant may give in evidence under this plea everything which negatives the allegations in the charge, and all matters of excuse and satisfaction.³ Only pleas to the jurisdiction must be pleaded specially, and cannot be pleaded with the general issue.⁴

¹ *Williams v. Jones*, 11 A. & E. 643.

² *Dews v. Ryley*, 11 C. B. 434.

³ Wels. Cr. Pr. p. 124, 12th ed.

⁴ *R. v. Strahan*, 7 Cox. Cr. Cas. 85.

CHAPTER XXIII.

ON THE MEASURE OF DAMAGES.

It is proposed in this chapter to state and illustrate shortly the leading principles by which courts and juries are bound to estimate the damages which are recoverable by a plaintiff in an action of contract or tort. Such a chapter, although a new element in a work on evidence, is conceived to be strictly in its place, and to form a fit appendix to a branch of the subject in which the relevancy of evidence and the proof of issues have been treated.¹

The measure of damages is still a department of presumptive evidence. It rested originally, and it still rests in many cases, on an undefined conception of the extent of an injury. The rule necessarily operates at times as a standard founded on merely hypothetical, conventional, and even gratuitous assumptions. It originates in the *lex talionis*, or law of retaliation, which has always prevailed in uncivilized communities. But it has always been the first effort of legislators to withdraw the adjustment of compensation for an injury from the arbitration of individuals and even juries, and to regulate it by principles of written law. This task is comparatively easy as long as a community is in the infancy of its development. The law which prescribes "an eye for an eye, and a tooth for a tooth," and the

¹ At the time when this chapter was written originally, no modern English treatise existed on this subject. But since then Mr. Mayne's treatise on Damages has been published.

law which punishes all injuries to life or limb by a fixed standard of money compensation, may suffice for a primitive state; but it is clearly insufficient for, and inapplicable to, the wants of a complicated system of civilization. The institution of penalties is found to be wholly inapplicable to those manifold losses which arise out of breaches of contract; and especially in such cases it is seen that the principles on which damages should be estimated are peculiarly equitable in their nature; and that there is no province of common law which more manifestly requires to be tempered by the infusion of equitable principles. It has, therefore, long been the practice in civil cases to leave the assessment of damages to the decision of a jury. But it has also been found that a certain amount of arithmetical accuracy may be embodied in rules for the guidance of their discretion. It is the province of a judge to direct a jury to calculate and award damages according to these rules; and to tell them that they must not trust to the vague justice of impulsive computation. When these rules are wanting, or inapplicable, juries must still trust to their conscientious appreciation of claims in each particular case. But the intervention of such rules, whenever they are applicable, will always be regarded, even by the assessors, as a safeguard against the contingency of damages being either excessive or insufficient.

The measure of damages, and the rules by which they should be computed, will be considered as applicable to—1st, actions of contract; and, 2nd, to actions of tort.

THE MEASURE OF DAMAGES IN ACTIONS OF CONTRACT.

In *Alden v. Keighley*,¹ Pollock, C. B., said:—"All questions of damages are, strictly speaking, for the jury; and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule that—

The amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken."

In the case which produced this expression of a first and fundamental principle, the breach was the non-payment of the balance of a bill, which the defendant had agreed to discount; and it was held that the plaintiff was entitled to recover the original amount of the bill, minus a sum which the defendant had been authorized to deduct; and minus also such a sum as the jury held to be a reasonable charge for discount. Here the damages were assessed strictly according to the above rule, as qualified by the special evidence; and the deductions from the amount due on the original contract, as defined by the bill, were made according to the express incidents of the contract. But in an earlier case, where A. paid over a sum to B., to provide for a bill due from A. to C.; and B., instead of doing so, retained it for a payment due from A. to B.; A.'s assignees were held entitled in special assumpsit to recover the whole amount of the bill.² Where a claim is liquidated, and interest is payable on it, either at common law or by statute, the measure of damages is the principal and interest of the money since the day it became

¹ 15 M. & W. 117.

² *Hill v. Smith*, 12 M. & W. 618.

[EV.]

due;¹ and it has been suggested that similarly the measure of damages for non-delivery of a chattel would be the average profit to be made by the use of the chattel.² But the claim here seems to have been more in the nature of unascertained and unliquidated damages, and so to be measured by the rules in *Hadley v. Baxendale* and other cases, which will be investigated subsequently. Generally, it has been said that "when damages are sought to be recovered for a breach of contract, they must be damages which are appreciable, capable of being stated, and capable of being estimated; and damages which are incapable of being appreciated or estimated, the court do not consider that the jury are at liberty to entertain when the action is on contract."³

The above cases are examples of the rule of computation where the damages are liquidated and defined by the express terms of the contract. Where they are unliquidated, the rule of the common law is, that—

Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.⁴

It is meant by this rule that the sufferer by a breach of contract is entitled to actual compensation for the pecuniary loss which he incurs by the breach, with due regard to its circumstances; and the damages will be proportionably reducible, if the plaintiff have aggravated them by his own neglect. Thus, if the breach be non-delivery of goods at a certain time, according to a contract of sale, the measure of damages for a breach is the difference between the contract price, and that for which similar goods might have been purchased in the

¹ *Fletcher v. Tayleur*, 25 L. J. 66, C. P.

² *Ibid.* : per Jervis, C. J., and Willes, J.

³ Pollock, C. B.: *Hamlin v. Great Northern Railway*, 26 L. J. 21, Ex.

⁴ Parke, B., 1 Exch. 855.

market at or about the day when they ought to have been delivered.¹ Accordingly, if a party do not avail himself of this right, and suffer subsequent loss from the omission, he cannot annex it to the original measure of damages.² Thus, damages on breaches of contract for the purchase or sale of stock or railway shares are computed according to the market price of such stock or shares at the time of the breach.³ In these cases, also, it appears that the damage must be direct and immediate ; and not merely the loss of a non-personal profit, such as that which would have been gained by a vendee of the original purchaser.⁴ So, it appears that a vendee of railway shares can claim, as damages for non-delivery, only the difference between the stipulated price and the market price on the day of the breach ; and not damages ultra for the increased value of the shares on a later day.⁵ But where stock is actually in existence, and the claim is in the nature of detinue for non-delivery, it appears that the damages will be the value of the stock at the time of trial.⁶

Even where the plaintiff, owing to the discovery of the unsoundness of a horse which had been warranted sound by the defendant, had lost a profit, which he would have had on a completed bargain of resale, he was not allowed to claim the loss as special damage, because it did not appear that he had laid out any money on the horse.⁷

When the purchaser of goods refuses to accept, the measure of damage is to be calculated according to the market value of the goods at the time when they were tendered, and when they ought to have been accepted; and not according to their market value at the time when the purchaser refused to accept.⁸ When in such

¹ *Dunlop v. Higgins*, 1 H. of L. 403.

² *Gainsford v. Carroll*, 2 B. & C. 624.

³ *Shaw v. Holland*, 15 M. & W. 136.

⁴ *Peterson v. Ayre*, 13 C. B. 353.

⁵ *Tempest v. Kilner*, 3 C. B. 249.

⁶ *Owen v. Routh*, 23 L. J. 105, C. P.

⁷ *Clare v. Maynard*, 6 A. & E. 519.

⁸ *Philpotts v. Evans*, 5 M. & W. 475.

a case the vendor has suffered any special damage, as by having to pay compensation for the rescission of a sub-contract which he has entered into in order to be able to perform the substantive contract with the purchaser, it will be rightly considered by the jury in assessing the general damages of the breach.¹

When there is a complete breach before the day of performance, as by the defendant refusing to fulfil his share of the contract, the right of action accrues immediately, and the jury, in assessing damages, will be justified in looking to all that has happened, or was likely to happen, to increase or mitigate the loss of the plaintiff, down to the day of trial.²

In contracts for the sale of land, a purchaser can recover only nominal damages for the mere loss of his bargain, where the vendor is, without fraud or gross negligence, incapable of making a title.³ But where there is fraud, or wilful laches on the part of the vendor, in holding out for sale property to which he cannot make a title, he will be liable in damages according to the special circumstances of the purchaser's loss.⁴ But there must be fraud, or gross negligence amounting to fraud, in the vendor's conduct; and where the defendant agreed to sell to the plaintiff, who, after an imperfect examination of the abstract of title, agreed to purchase, and contracted also to resell, but subsequently refused to complete, on account of a defect, and thereupon sued for the expenses of investigating the title, the expenses of resale, the profits which he would have received from it, and the amounts in which he was liable to his own vendee; he was held entitled only to the expenses of investigating the title, and nominal damages for the breach, because no fraud was imputable to the defendant.⁵

¹ *Cort v. Eastern Junction Railway*, 20 L. J. 460, Q. B.

² *Hochster v. De Latour*, 22 L. J. 455, Q. B.

³ *Pounsett v. Fuller*, 25 L. J. 145, C. P.

⁴ *Hopkins v. Grazebrook*, 6 B. & C. 31.

⁵ *Walker v. Moore*, 10 B. & C. 416.

Where the breach is the act of the purchaser, the measure is the difference between the price fixed by the agreement, and the market value at the time when the purchase ought to have been completed. Accordingly, the damages will be nominal when these amounts are identical. Thus, where the defendant, after agreeing to purchase land, had been let into possession, and had derived profits from its produce, but had subsequently refused to complete the purchase ; it was held that the plaintiff was not entitled to recover the whole purchase money, but only such damages as had resulted from the defendant's breach of the contract, and that these were properly measured by a verdict for the interest on the purchase money from the time of the breach up to the commencement of the action, added to the value of the profit which the defendant had derived from the land. Parke, B., said :—
“ The measure of damages in an action of this nature is the injury sustained by the plaintiff, by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money in consequence of the non-performance of the contract. It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant ; as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again.”¹

Where goods delivered prove to be of a quality inferior to that which was contracted for, the measure of damages is the difference, at the time of delivery, between the market price of such goods as were contracted for, and the price for which the delivered goods sell within a reasonable time after delivery.²

¹ *Laird v. Pim*, 7 M. & W. 471 ; cf. *Loundes v. Fontaine*, 25 L. J. 49, Ex.

² *Loder v. Kekule*, 27 L. J. 27, C. P.

The measure of damages will not be affected by the fact that the original contract could not be enforced at law. Thus, where it was inoperative, as not being in writing within the Statute of Frauds, it was held that the damages for the breach, which disabled the plaintiff from performing a contract with third parties, were, notwithstanding, to be assessed according to the measure of profit which the plaintiffs would have received from such third parties, if the defendants had fulfilled their engagements.¹ In that case Alderson, B., is reported to have said :—"If a person undertakes to make a certain article for another, and to deliver it to him on a particular day, but fails to do so until a year afterwards, it would be most unreasonable that the latter should not recover any damage because the contract was not in writing. The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said 'we should have made such and such a contract if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so; that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract."

It might be inferred from this language, which is very questionable,² that the contingency of profit, which might have resulted to a plaintiff if the contract had been fulfilled, may be taken, generally, as a measure of damages for a breach. But such is not the case: and the above doctrine of the learned judge is to be received with restriction, and as applicable merely to cases where juries are satisfied that the special damage has been contemplated, or may be considered reasonably as having been contemplated, at the time of the contract, by both parties. The rule on this head has been settled in a leading case. There the action was against a carrier; and the damage was alleged to have arisen

¹ *Waters v. Towers*, 8 Exch. 401.

² See *Smeed v. Poord*, 28 L. J. 178, Q. B.

from a delay of several days in the delivery of some pieces of broken iron (which formed the shaft of the plaintiff's mill) to the engineer who was to repair them ; whereby the mill was stopped, and the plaintiff lost profits, &c. The defendant had been informed, at the time of the bailment, that the pieces formed the broken shaft of a mill, and that they must be delivered immediately : but not that the mill could not work until the shaft should be returned. The judge left the question of damages to the jury, without any special direction : but the court above granted a new trial, on the principle that the jury should have been told not to take the loss of profit into consideration at all, in estimating the damages ; and Alderson, B., in delivering the judgment of the court, said :—" We think the proper rule in such a case is this :—

" Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be either such as may fairly and reasonably be considered arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself : or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

" Now, if the special circumstances, under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But on

the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract : ” and his lordship, after remarking that the stoppage of the mill was not such a necessary consequence of the delay as the defendant could know without special communication, added : “ It follows, therefore, that the loss of profit here cannot reasonably be considered such a consequence of a breach of contract, as could have been fairly and reasonably contemplated by both these parties when they made this contract : for such loss would not naturally have flowed from the breach of this contract in the great multitude of such cases, occurring under ordinary circumstances ; nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendant.”¹

In such cases it has been suggested that the proper measure of damages for the non-delivery of a chattel on a fixed day, should be either an average per centage of mercantile profits,² or the average profit to be made by the use of the chattel ;³ but in the case in which these suggestions were made by the judges, it was thought that in an action for non-delivery of a ship, the damages were not too high which gave the difference between the profits which the ship would have made if she had been duly delivered when freights were high, and the profits she earned when delivered some months later when freights were low. But this doctrine seems to trespass on that of *Hadley v. Baxendale*, since the subsequent fall of freights can scarcely be considered to have been contemplated by the parties at the time

¹ *Hadley v. Baxendale*, 9 Ex. 341 ; 23 L. J. 179, Ex.

² Jervis, C. J.: *Fletcher v. Tayleur*, 25 L. J. 66, C. P.

³ Willes, J.: 25 L. J. 66, C. P.

when they contracted, as a probable or natural result of a breach; and the limit, also, to such damage appears too remote.

The doctrine of *Hadley v. Baxendale* has been maintained firmly in all subsequent cases. Thus, a plaintiff had agreed to repair a steam thrashing machine for S., and had employed the defendant to repair a fire box forming part of it. The defendant failed to do the repair within the fixed time; and when he had completed it, the fire box proved to be worthless. S. sued the plaintiff for nonperformance of the contract between them; and the plaintiff compromised the action (which arose entirely out of the defendant's negligence) by paying S. twenty pounds. Then the plaintiff sued the defendant and claimed the sum paid to the defendant for repairs, the price which the plaintiff paid for a new box, and also the twenty pounds he had paid S. The first two sums were not disputed; but the court held that the plaintiff was not entitled to the latter, as the defendant knew nothing about the plaintiff's contract with S. until long after the defendant had broken his contract with the plaintiff.¹

In this case there was nothing to fix the defendant with an actual or constructive knowledge of the necessary or probable special damage which the plaintiff would suffer from the breach of contract. In the following case there was such a constructive knowledge, and therefore the defendant was held to be liable to the full extent of such special damages. He had sold to the plaintiff under a warranty, as it seems, inferior seed barley as Chevalier seed barley. The plaintiff re-sold under a similar warranty to a third person, who sowed and received an inferior crop from the seed. The plaintiff had agreed to compensate his vendee, but had not fixed any sum. A sum of 261*l.* seems to have been found by the jury to be the sum which the plaintiff was liable to pay his vendee; and the court held

¹ *Portman v. Middleton*, 27 L. J. 231, C. P.

that the plaintiff was entitled to recover that sum from the defendant, who, when he warranted the seed to be good, must be held to have contemplated the pecuniary loss which the failure of the crop was certain to cause to any purchaser or sub-purchaser of the seed, if it turned out to be bad seed.¹

Similarly, in one of the latest cases, the courts have shown no disposition to limit, but rather to extend, the doctrine of *Hadley v. Baxendale*. The plaintiff, a farmer, had contracted to buy a threshing machine from the defendant, who had undertaken to deliver it within a month. He was warned that if it were not delivered by a subsequent day—14th August—the plaintiff would have to hire one. The plaintiff was induced by the defendant's promise to wait still longer; and the plaintiff's corn was then subsequently damaged severely by rain. The court held the plaintiff entitled to recover the damage done to the wheat, and the cost of kiln-drying, as the natural consequence of the defendant's breach of contract; but not, it seems, the loss arising from a fall in the market price of corn.²

The rule that damages must not be remote, but the natural and proximate result of the act complained of, has been stated to be more easy to lay down than to apply;³ and the preceding examples will be thought probably to verify this statement. They appear to have limited materially, if they have not virtually abolished, the doctrine, for which there is still high authority,⁴ that a plaintiff on a breach of contract is entitled to damages arising out of his own inability to fulfil a contract which he would probably have fulfilled, if the defendant had fulfilled his contract with the plaintiff. But the latest cases, which have been considered now at length, appear to settle clearly

¹ *Randall v. Roper*, 27 L. J. 266, Q. B.

² *Smeed v. Foord*, 28 L. J. 178, Q. B.

³ Sedgwick, p. 75; cf. *Thompson v. Hopper*, 26 L. J. 18, Q. B.

⁴ *Waters v. Towers*, sup. p. 246; *Dunlop v. Higgins*: per Lord Cottenham, 1 H. of L. Cas. 403.

that mere inability to fulfil a sub-contract arising out of the breach of contract on which damages are claimed, cannot be computed, unless the defendant knew actually or constructively of its existence at the time when he entered into his contract with the plaintiff.

Where any portion of the assigned damage is attributable to the plaintiff's own negligence, he cannot claim compensation for it. Thus, where he booked through to a town on a railway, and was forced to stop at an intermediate place, because the defendant had no train to forward him, as contracted for, to the end of his journey; he was held to be entitled only to his hotel expenses for the night, and railway fare to his destination next day, and not to special damage which he had sustained by failing to keep appointments with his customers. *Martin, B.*, even doubted whether he could claim his hotel expenses. In this case the damage was limited to inevitable pecuniary loss, and by the consideration that the plaintiff ought to have taken a postchaise to his destination, and charged it to the defendants.¹

The damages, payable by an unauthorized agent for the non-acceptance by his alleged principal of goods bought for him, are the difference between the contract price and the loss on resale, as well as any special expenses arising out of the order of the unauthorized agent.² Where the action is for not loading pursuant to a charter party, the damages are the amount of freight which the ship would have earned if she had been loaded, minus the expenses in carrying the freight, and also deducting any sum the ship has actually earned elsewhere.³

Where, in consequence of a late delivery of goods, the plaintiffs lost the market which they expected, and incurred expense in transferring them to another market, it seems to have been held that, in the absence

¹ *Hamlin v. Great Northern Railway*, 26 L. J. 20, Ex.

² *Simons v. Patchett*, 29 L. T. 88.

³ *Smith v. M'Guire*, 27 L. J. 465, Ex.

of a special agreement by the defendants to deliver by a particular time, they were not liable for such expenses, although the jury might award them if they thought on the evidence that there had been unreasonable delay in the delivery.¹ So, where the defendants had failed to deliver implements of the plaintiff's in time for an agricultural exhibition, and the plaintiff calculated his losses by profits which he had made by the sale of similar implements at previous exhibitions, the Court seems to have held that the jury, guided by this calculation, might give what they thought a fair amount of damages.² But where, owing to a late delivery, manufactured goods had become useless for competition, the judges were disposed to hold that the carrier was liable only for the value of the labour and the materials of the goods, and not for damage founded on the contingency that if the goods had been delivered in time, they might have obtained a prize of a hundred guineas.³ So, in such actions, damages for general loss of custom cannot be recovered.⁴

The breach of a contract constitutes in every case a title to damages ; but they will be measured by the actual loss, and be only nominal where none has been sustained.⁵ In this respect the rule in contracts is very different from the rule in torts, where an injury which affects merely the feelings of the claimant may be the ground of heavy damages.⁶ But there are cases where the breach of a contract may be in the nature of a tort, and in which it is not necessary to prove substantial damage in order to recover high damages ; and where, accordingly, there is no measure of damages beyond the discretion of the jury in estimating the

¹ *Black v. Bazendale*, 1 Exch. 410.

² *Cawley v. North Staffordshire Railway*, 26 L. T. 222.

³ *Watson v. Ambergate Railway*, 15 Jur. 448.

⁴ *Crouch v. Great Northern Railway*, 25 L. J. 139, Ex.

⁵ Alderson, B.: 7 M. & W. 478.

⁶ *Hamlin v. Great Northern Railway*, 26 L. J. 20, Ex.

circumstances of the case. Thus, in actions for breach of promise of marriage, the measure of damages is in the discretion of the jury, who may consider not merely the loss by the plaintiff of an establishment in life, but also the injury to her feelings; and no verdict will be set aside on the ground that the amount awarded is excessive, unless it be shown that the jury have been influenced by passion, prejudice, or corruption.¹ Thus, also, in an action against a banker for refusing to pay a cheque, while he has assets of the plaintiff in his hands; the plaintiff is entitled, not only to nominal² but to substantial damages, although he may not have sustained any actual damage.³ Accordingly, it was held in *Rolin v. Steward*, where the plaintiffs were merchants, that the judge was right in telling a jury to give "not nominal nor excessive, but reasonable and temperate damages;" and that, considering the tendency of such a refusal to injure the credit of the plaintiffs, 500*l.* were not excessive damages, although no actual damage was proved.⁴

But it is only where the breach of contract assumes the nature of a tort by a manifest tendency to injure the plaintiff in his character or profession, that the motives of the defendant, or the feelings of the plaintiff, ought to be considered in measuring damages. Thus, in actions for wrongfully dismissing servants or clerks during the continuance of a term, the damages should be such as to indemnify for the loss of wages during the time necessarily spent in obtaining a fresh situation, and for the loss of the excess of any wages contracted for above the usual rate; but no allowance should be made in the nature of a *pretium affectionis*, or of compensation for the injury done to the sensibilities of a plaintiff.⁵ Erle, J., has said that in such a case,

¹ *Hamlin v. Great Northern Railway*, 26 L. J. 23, Ex.

² *Marzetti v. Williams*, 1 B. & Ad. 425.

³ *Rolin v. Steward*, 23 L. J. 148, C. P.

⁴ Sedgwick, pp. 206 to 214; Erle, J.: 2 H. L. Cas. 607.

⁵ *Ibid.*; *Hamlin v. Great Northern Railway*, sup.

“The measure of damages for the breach of promise is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved; and that where a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment.”¹ Accordingly, the same learned judge has said, “that where equally eligible employment is at his option, the indemnity for the loss by breach of contract would be a small amount; but, if the circumstances are reversed, the employment under the contract may be such that the damages may exceed the salary.”²

In actions against a co-contractor for contribution to a debt which the plaintiff alone has been compelled to pay, the damages will be measured by the number of the original parties to the contract; and the plaintiff will be entitled to an aliquot portion from each co-contractor, calculated according to the original interests of each.³

In actions by a landlord against a tenant for breach of covenant to repair, the measure of damages is the sum required to put the premises in repair.⁴ But where on a covenant by a lessee to repair old premises, which were afterwards burned down, it appeared that when they were rebuilt they would be more valuable by six hundred pounds than the old premises were; it was held that the lessee was liable to the lessor to the estimated amount of rebuilding, less six hundred pounds.⁵

¹ *Beckham v. Drake*, 2 H. of L. Cas. 607; *assent. Crompton, J.*, 13 C. B. 508.

² *Emmens v. Elderton*, 13 C. B. 519.

³ *Batard v. Hawes*, 2 E. & B. 287.

⁴ *Davies v. Underwood*, 27 L. J. 113, Ex.

⁵ *Yates v. Dunster*, 24 L. J. 226, Ex.

Where a tenant held over for a quarter, after notice to quit at the end of a year, with the knowledge that the landlord had let the premises to another tenant from the end of the year, he was held to be liable to the landlord for the damages and costs of an action by the second tenant against the landlord for not giving him possession at the stipulated time.¹

In use and occupation, where there is no express agreement as to rent, the value of the premises must be proved, and will be the measure of damages.² Where the value of straw was to be spent on land, the court were divided as to whether it was the value as manure, or the market value as straw.³

Where there is a stipulated rent by agreement or deed, and the defendant holds over after the expiration of his term, he will be considered to hold on the terms of the original tenancy, unless there be anything to show a different understanding.⁴ In this case the damages will be not the value of the land, but the real damage sustained by the landlord owing to the tenant holding over.⁵

Interest at common law can only be given as damages in cases where there has been either an express promise to pay interest; or a promise implied from the usage of trade or other circumstances.⁶ But by 3 & 4 Will. 4, c. 42, s. 28, upon all debts, or sums certain, payable at a certain time or otherwise, the jury, on the trial of an issue, or on any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if

¹ *Bramley v. Chesterton*, 27 L. J. 23, C. P.

² *Tomlinson v. Day*, 2 B. & B. 680.

³ *Lowndes v. Fountaine*, 25 L. J. 49, Ex.

⁴ *Mayor of Thetford v. Tyler*, 5 Q. B. 101.

⁵ *Watson v. Lane*, 25 L. J. 101, Ex.

⁶ *Fruhling v. Schroeder*, 2 Scott, 143.

payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

THE MEASURE OF DAMAGES IN ACTIONS OF TORT.

The measure of damages in actions of tort, which include neither fraud, malice, nor negligence so gross as to amount to malice, is regulated, as in actions of contract, by the principle of awarding compensation to the injured party.¹ But when a tort is accompanied by any of these circumstances of aggravation, juries may, and ought to, take into consideration such fraud, malice, or negligence, and award not merely compensatory, but exemplary or vindictive, damages ; in doing which their only safe guide will be a discretion which must be regulated by the facts of each particular case.

This doctrine indicates a broad distinction between the principles which regulate the measure of damages in torts, and those which have been investigated under the title of the measure of damages in breaches of contract. "Generally speaking, the rule is this : In the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings, and the pain he has experienced, as, for instance, the extent of violence in an action of assault ; and many topics and many elements of damage find place in an action for tort or wrong of any kind, which certainly have no place whatever in an ordinary action of contract."² Therefore, in actions of tort, the court generally will not interfere with the damages found by the jury, unless

¹ Sedgwick, 28.

² Pollock, C. B.: 26 L. J. 23, Ex.

they appear to be grossly disproportioned to the injury sustained.¹ Thus, where a landlord caused much damage to his tenant's crops by felling and removing timber, without his tenant's leave to enter, and the jury assessed the damages at 300*l.*, the court refused to interfere, although the entire value of the crops did not exceed 200*l.*²

So, in the case already cited, of a banker refusing to pay his creditor's cheque for 110*l.*; consideration for the peculiar injury which such a refusal was likely to inflict on the credit of the plaintiff as a merchant, was held sufficient ground for awarding 500*l.* damages.³ Thus, also, it is held that in actions for injuries to the personal reputation, there can be no certain measure of damages but the particular circumstances of the case under consideration.⁴ So, in an action for throwing poisoned barley on the plaintiff's premises, in order to poison his poultry, the jury were told not to confine their verdict to the actual damages sustained, but to consider besides the malicious intention of the defendant.⁵ But if the jury travel out of the case, or, in matters which admit of certain estimation, are influenced by prejudice to award damages which are manifestly excessive, the verdict will be set aside,⁶ although, in general, a court will not disturb a verdict where there is no certain measure of damages.⁷ In such cases, where no rule of damages can be declared, the assessment must be left entirely to the jury, and the functions of the court will be confined to the reception and exclusion of evidence, when offered either in aggravation or mitigation, and to a definition of the distinction between direct and consequential damage.⁸

¹ *Williams v. Currie*, 1 C. B. 841.

² *Ibid.*

³ *Supra*, p. 253; *Rolin v. Steward*, 23 L. J. 148, C. P.

⁴ *Gilbert v. Birkenhead*, Cowp. 230.

⁵ *Pearce v. Lyons*, 2 Stark. 317.

⁶ *Seale v. Hunter*, Lofft. 28; and *infra*.

⁷ *Day v. Holloway*, 1 Jur. 794.

⁸ *Sedgwick*, 493.

These principle are well illustrated in *Merest v. Harvey*.¹ There the defendant, who was a banker, magistrate, and member of Parliament, had forced himself on the land of the plaintiff, who was also a gentleman of fortune, had fired at his game, and insulted him grossly. In trespass *quare clausum fregit*, the jury gave 500*l.* damages, and the court refused to set aside this verdict as excessive. Gibbs, C. J., said : "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except damages ? To be sure one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life who should behave himself in this manner ? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner. Is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done.' Would that be a compensation ? I cannot say that it would be." And Heath, J., said : "I remember a case where the jury gave 500*l.* damages for merely knocking a man's hat off : and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."

Accordingly, in actions for malicious prosecution or arrest, the jury may give discretionary damages for the loss of reputation ; for the imprisonment, if any have taken place ; and for the expenses of the plaintiff for

¹ 5 Taunt. 442.

his defence.¹ But he cannot recover more than the taxed costs which he has incurred.² It has been held, however, by Lord Ellenborough, that, in such a case, he is also entitled to his costs as between attorney and client.³ So, in false imprisonment against a coroner, a plaintiff has been held entitled to the costs of quashing the inquisition.⁴ In malicious torts, generally, damages may be aggravated by the defendant's conduct in court.⁵

When the damage arises out of simple negligence, especially if it be not of a gross nature, the courts direct juries to attend more strictly to the question of mere pecuniary compensation ; although even in these cases the courts are unwilling to fetter the unlimited discretion of juries. Thus, in trespass for taking coals from the plaintiff's mine, where the defendant is a mere wrongdoer, the measure of damages is the value of the coals at the time when they were severed from the freehold ; and the defendant is not entitled to any deduction for the expense of taking them, nor for a rent payable to the mine owner.⁶ So where a landlord distrains goods, which are exempt from distress, with goods which are distrainable, the tenant, on paying the amount of rent and cost of distress, is entitled only to the actual damage sustained by the taking of the non-distrainable goods, and not to the whole amount paid by him.⁷ So, it has been held in a very late case that the proper measure of damage in such instances is the value of the thing wrongfully taken.⁸ Even where the jury gave the plaintiff as damages 200*l.*, which they found he had lost in his trade through the omission of the defendants to carry for him according to their duty as common carriers, the

¹ Bull. N. P. 13.

² *Sinclair v. Eldred*, 4 Taunt. 7.

³ *Sandbach v. Thomas*, 1 Stark. 306.

⁴ *Foxhall v. Barnett*, 23 L. J. 7, Q. B.

⁵ *Darby v. Ouseley*, 25 L. J. 233, Ex.

⁶ *Wild v. Holt*, 9 M. & W. 672; *Morgan v. Powell*, 3 Q. B. 378.

⁷ *Harvey v. Pocock*, 11 M. & W. 740.

⁸ *Keen v. Priest*, 32 L. T. Rep. 319.

court held the damages to be too general and remote, and therefore not recoverable.¹

On a policy of insurance guaranteeing a certain sum to the plaintiff's representatives on his death, and a proportionate sum to himself in the event of injury by a railway accident, the damages are confined to compensation for bodily pain and suffering, and the amount of the medical attendant's bill ; and damages for loss of time and profits are not recoverable.² This principle arose out of a contract, but the same has been extended to actions for compensating the families of persons killed by accidents, under 9 & 10 Vict. c. 93. By the 2nd section of that act "in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." . . . "The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family."³ The damages are confined to injuries of which a pecuniary estimate can be made ; and the jury must not consider the mental sufferings of a plaintiff, *e. g.*, of a wife for the loss of her husband,⁴ but they may take into account a reasonable expectation of pecuniary advantage which the plaintiff would have had from the continued life of the deceased, and the probable pecuniary loss which the plaintiff has sustained by the death.⁵ Neither funeral expenses nor mourning can be included in the damages.⁶

Where the action is for negligence which has caused the death of the wife, the husband is entitled to damages for the loss of her society, and his own distress of mind, from the time of the accident up to

¹ *Crouch v. Great Northern Railway*, 25 L. J. 137, Ex.

² *Theobald v. Railway Assurance Company*, 23 L. J. 249, Ex.

³ Per cur.: 21 L. J. 237, Q. B.

⁴ *Blake v. Midland Railway Company*, 21 L. J. 233, Q. B.

⁵ *Franklin v. South Eastern Railway Company*, 6 W. R. 573 ;
Dalton v. South Eastern Railway Company, 27 L. J. 227, C. P.

⁶ *Ibid.*

the hour of dissolution ; but not, it is said, for consequential damages which are subsequent to the death.¹ In other cases of tort to the wife, the damages will be measured by the extent of the personal injury to the wife and the consequential injury to the husband.²

DEFAMATION.

In actionable slander, without special damage, damages may be assessed on evidence merely of the words spoken ;³ and, in libel, on proof of publication alone, without evidence of special damage.⁴ But where special damage is the gist of the action, it must be proved as laid, or the plaintiff will be nonsuited.⁵ And such special damage must not be too remote, but the legal and natural consequence of the slander.⁶ Thus, where the plaintiff was deprived of the hospitality of friends owing to the slander, this was held sufficiently consequential ;⁷ but where a singer engaged by the plaintiff refused to sing on account of a libel published by the defendant, the damage was held by Lord Kenyon to be too remote.⁸ Matters occurring after the action has been brought, or even in the course of the trial, may be used to enhance the damages, and as evidence of the malice of the original libel. Thus a plea of justification not proved will enhance damages, as showing that the charge was persisted in even after action.⁹ Damages will not be reduced in an action for

¹ *Baker v. Bolton*, 1 Camp. 493, Lord Ellenborough.

² *Dengate v. Gardiner*, 4 M. & W. 5.

³ *Tripp v. Thomas*, 3 B. & C. 427.

⁴ *Ingram v. Lawson*, 6 Bing. N. C. 212.

⁵ Rosc. N. P. 433.

⁶ *Haddon v. Lofft*, 24 L. J. 49, C. P.

⁷ *Moore v. Meagher*, 1 Taunt. 39.

⁸ *Ashley v. Harrison*, 1 Esp. 48.

⁹ Pollock, C. B.: *Darby v. Ouseley*, 25 L. J. 230, Ex.

libelling the plaintiff in his religious opinions by evidence of his speculative views ; nor is such evidence even admissible.¹

TRESPASS TO THE PERSON OR PROPERTY.

In trespass to the person, or to property, all the circumstances should be considered in measuring damages : and where there is any special circumstance of aggravation, as a charge of felony, it ought to be computed.² Or if a plea is put on the record, imputing the commission of a felony to the plaintiff, and abandoned at trial, it may be treated as matter of aggravation.³ But where the matter of aggravation is apportionable in different degrees among several co-trespassers, it has been left expressly doubtful how far it is a sound rule that the measure of damages in tort ought to be the sum which ought to be awarded against the most guilty of the defendants.⁴

SEDUCTION.

In seduction, although the mere loss of service is the substance of the action, yet damages ultra may be given in consideration of any peculiar and aggravating circumstances.⁵ Thus, where the seduced party had been adopted and educated by the plaintiff as his daughter :⁶ where the seducer had been received in the family as a suitor in an honourable way :⁷ or even

¹ Pollock, C. B.: *Darby v. Ouseley*, 25 L. J. 230, Ex.

² *Bracegirdle v. Orford*, 2 M. & S. 507.

³ *Warwick v. Foulkes*, 12 M. & W. 507.

⁴ *Gregory v. Cotterell*, 22 L. J. 217, Q. B.

⁵ *Irwin v. Dearman*, 11 East, 23.

• Ibid.

⁷ *Dodd v. Norris*, 3 Camp. 519.

in cases where the aggravation consists only in the dishonour, or loss of society and comfort which the father has sustained in the case of a child, or a master in the case of his servant, it appears that such circumstances may be rightly taken into consideration by a jury.¹ But an actual loss of service must be proved, for the law implies no damage from the mere act of seduction;² but where a plaintiff's daughter is seduced during a temporary absence from home, it is not inconsistent with the continuance of her relation to the plaintiff as his servant.³ The expenses of confinement may also be recovered as special damage.⁴ It seems that loss of service caused by illness arising out of the girl's distress of mind cannot be computed.⁵

TROVER.

In this action,⁶ the measure of damages is the value at the time of conversion of the thing taken;⁷ and if it be returned, the special damage is the loss by detention, including the loss by deterioration. In trover for a bill, the principal and interest due on it, at the time of the refusal to deliver it, is the measure; but the jury are not limited by the mere value of the chattel at the time of conversion, but may give, in their discretion, ulterior damages for a value which the chattel acquired subsequently.⁸ And when special damage is laid and proved, it may be annexed to the

¹ *Southernwood v. Ramsden*, 2 Selw. N. P. 1100.

² *Eager v. Grimwood*, 16 L. J. 236, Exch.

³ *Griffiths v. Teetgen*, 24 L. J. 35, C. P.

⁴ *Tullidge v. Wade*, 3 Wils. 19.

⁵ *Boyle v. Brandon*, 13 M. & W. 738.

⁶ Pattenon, J.: *Cook v. Hartle*, 8 C. & P. 568.

⁷ *Mercer v. Jones*, 3 Camp. 477; *Wood v. Bell*, 25 L. J. 321, Q. B.; *Homes v. Mallan*, 30 L. T. 241.

⁸ Abbott, J.: *Greening v. Wilkinson*, 1 Q. & P. 625.

measure of the value.¹ Thus, in trover for a horse, where it was laid as special damage that the plaintiff was compelled to hire other horses: it seems to have been held that the measure would be the value of the horse at the time of conversion, and the amount paid by the plaintiff for hire, minus the expenses he would have incurred during the time in keeping his own horse.² But if goods have been re-delivered, and no special damage by their detention have been laid and proved, the plaintiff will be entitled only to nominal damages for the detention.³ Thus, also, where the goods taken had been assigned to the defendant by the plaintiff as a security for a debt, but the defendant was to take possession only on default in payment, and on notice; default was made, and notice given, but informally; it was held that a verdict for the value of the goods ought to be reduced to a sum proportioned to the limited interest which the plaintiff had in the goods at the time of the trespass.⁴ In such a case it appears that the goods become the property of the defendant, either from the time of conversion, or from the time when the plaintiff receives the damages in compensation.⁵ In trover on an irregular distress, nominal damages cannot be recovered, unless actual damage have been sustained.⁶

SHERIFFS.

If a sheriff sell goods which he has taken under a *fi. fa.* at a sum below their best market value at the time of sale; and the judgment creditor, in conse-

¹ *Bodley v. Reynolds*, 8 Q. B. 779; *Spanish Company v. Bell*, 25 L. J. 148, Q. B.

² Parke, B.: *Davies v. Oswell*, 7 C. & P. 804.

³ *Moon v. Raphael*, 2 Bing. N. C. 310.

⁴ *Brierly v. Kendall*, 21 L. J. 161, Q. B.

⁵ *Buckland v. Johnson*, 23 L. J. 204, C. P.

⁶ *Rogers v. Parker*, 25 L. J. 220, C. P.

quence, does not receive his entire debt : the latter is entitled to substantial damages in an action against the sheriff for the fraud or negligence.¹ So, if a sheriff seize wrongfully, as by putting in a second execution after levying under a first ; the amount of damages is discretionary with the jury : and the court will not reduce the amount as excessive, unless the defendant has acted clearly *bonâ fide*, or under circumstances of excusable mistake.²

EJECTMENT.

A plaintiff, who has recovered judgment in this action, is entitled, at common law, to recover as damages the mesne profits from the day of the demise in the original action, down to the judgment ;³ and a landlord under 1 Geo. 4, c. 87, s. 6, as re-constituted by the 224th section of the Common Law Procedure Act 1852, may in ejectment against a tenant, after notice to the defendant, and proof of his right of possession to the premises, “go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant’s interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein ; and the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the premises, and also as to the amount of damages to be paid for such mesne profits : and in such cases, the landlord shall have judgment within the time hereinbefore specified” (scil. by sect. 185), “not only for the recovery of possession and costs, but also

¹ *Mullett v. Challis*, 20 L. J. 161, Q. B.

² *Gregory v. Cotterell*, 22 L. J. 217, Q. B. ; cf. *Tancred v. Allgood*, 33 L. T. Rep. 150.

³ *Goodtitle v. Tomba*, 3 Wils. 118.

for the mesne profits found by the jury: provided always, that nothing" in the section "shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict on the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

It has been decided, on the previous statute of 1 Geo. 4, c. 87, s. 2, that damages for mesne profits may be recovered under it down to the day of trial, though no notice of trial has been proved.¹

At common law, a plaintiff is not confined to the very mesne profits or rent of the premises only, but may recover for his trouble, &c.: and it has even been said, that there have been cases where the jury has given four times the value of the mesne profits where there has been an aggravated trespass.² But the modern tendency is to give only the actual pecuniary damage sustained by the plaintiff being out of possession.³ As to special damage in such cases, see Woodfall's Landlord and Tenant, 6th edit. pp. 712, 713.

NUISANCE.

Where a nuisance is in the nature of a trespass to land, the measure of damages is the loss actually sustained; and not the sum which it would take to restore the land to its condition, as it was before the trespass. Therefore, where the defendant had cut and carried away the soil of the plaintiff, the value of the soil, and not the expense of restoring the land to its former state, was held the right measure.⁴ So, the measure of damage to a plaintiff's reversion by pulling down a

¹ *Doe d. Thompson v. Hodgson*, 12 A. & E. 135.

² *Gould, J., and Wilmot, J.*: 3 Wils. 121.

³ *Watson v. Lane*, 25 L. J. 101, Ex.

⁴ *Jones v. Gooday*, 8 M. & W. 146.

house, has been held to be the diminished market value of the premises, in consequence of the defendant's wrongful act.¹ But in such cases the damage to the plaintiff's reversionary interest must be clearly proved: and where the declaration alleged as the nuisance a wall overhanging a yard (of which the plaintiff was the reversioner), and producing a deposit of rain, without alleging any actual injury to the reversion, the plaintiff was held, on motion in arrest of judgment, not to be entitled to damages.² When the injury is trifling, and may form the ground of subsequent actions, a jury ought to give only nominal damages in the first instance, but exemplary damages if the nuisance be continued.³

Where the defendant left habitually the door of the reversioner's premises open,⁴ and where the defendant had merely trespassed by entering on property,⁵ it is doubtful if the plaintiff was entitled even to nominal damages.

The remedy for a nuisance, which is of a public nature, is by indictment; and no action can be maintained, nor damages recovered, unless it be shown to have caused some particular injury to the plaintiff.⁶ In such a case an action will lie, and, it is said by Blackstone, a fresh action for every continuance of the nuisance: and very exemplary damages will probably be given, if, after one verdict against him, the defendant have the hardihood to continue it.⁷ So, where the plaintiff's custom was obstructed and diminished by the works of the Hungerford Market Company, who had, under their local act, blocked up the thoroughfare in which the plaintiff's shop was, and continued the obstruction for an unreasonable time, the plaintiff was

¹ *Hosking v. Phillips*, 3 Exch. 168; cf. *Davies v. Underwood*, 27 L. J. 113, Ex.

² *Jackson v. Pasked*, 1 M. & S. 234.

³ *Bathishill v. Reed*, 25 L. J. 290, C. P.

⁴ *Young v. Spencer*, 10 B. & C. 145.

⁵ *Baxter v. Taylor*, 4 B. & Ad. 72.

⁶ *Williams' case*, 5 Rep. 72.

⁷ 3 Bl. Com. 220.

held entitled to damages according to the circumstances of the case.¹ Thus, also, the discharge of smoke from the defendant's chimneys into the plaintiff's house,² or the depreciation of the value of property in consequence of the neighbouring nuisance,³ may be rightly considered in measuring damages.

PENALTIES AND LIQUIDATED DAMAGES.

When a sum has been named between the parties to an action, as a forfeit in the event of a breach, it depends on the terms of the agreement whether it is to be regarded as an absolute forfeiture of the specified sum, and so as damages already measured and liquidated, or merely as a gross sum reserved, out of which discretionary damages are to be assessed. It is the fluctuating disposition of the courts to look on such penalties in the latter point of view.⁴ Even where the parties have expressly stipulated that a specified sum is to be viewed, not as a penalty, but as ascertained and liquidated damages, which are to be recoverable on the breach of any part of the contract, the courts have refused to award it.⁵ But if a specified sum be named as liquidated damages, in the event of the performance or non-performance of a specified act, as where A. promised to pay B. a thousand pounds within three months after his marriage, if he married any other person, this sum was held to be liquidated, and the proper measure of damages.⁶

The cases under this title are very conflicting and unsatisfactory ; nor is it possible to reconcile them, nor

¹ *Wilkes v. Hungerford Market Company*, 2 Bing. N. C. 281.

² *Rich v. Basterfield*, 2 C. & K. 257.

³ *Gauntlett v. Whitworth*, 2 C. & K. 720.

⁴ *Betts v. Burch*, 33 L. T. Rep. 151. .

⁵ *Kemble v. Farren*, 6 Bing. 141.

⁶ *Lowe v. Piers*, 4 Burr. 2225.

to draw from them any fixed rule of certain and universal application. On the one hand it is laid down that the principle in each case is to consider the real intention of the parties ;¹ and that people ought to perform their agreements literally as they make them. According to this rule of construction, it has been held in several cases that, where a sum is reserved distinctly as liquidated damages, to be payable as such in the event of any one of several breaches clearly contemplated as contingencies, and intended clearly to be guarded against, the whole sum is recoverable as liquidated damages, payable on a single breach.² Thus, where a plaintiff and defendant had covenanted to carry on business as surgeons for a certain time, and the defendant covenanted to do certain acts for the plaintiff within and after that time ; and it was stipulated that in case of default by the defendant in performance of this covenant, he should pay the plaintiff 2000*l.*, not as a penalty, but as ascertained and liquidated damages ; the court followed the literal construction, and assigned the whole amount as liquidated damages on a breach.³ And in a similar and later case, where the language was less clear, and the defendant was bound, on certain specified contingencies happening, to pay the whole sum reserved by a bond ; the court held the damages to be liquidated.⁴ The principle of these cases seems to be that the damages will be treated as liquidated, either when the breaches are distinctly and prospectively contemplated and expressed in the bond, or when the damage arising from the breach is essentially uncertain and incapable of being computed accurately. On the other hand, it is said that “if the covenant relates to matters which are not of an uncertain nature and amount, as when

¹ Coleridge, J., and Erle, J.: *Reynolds v. Bridge*, 26 L. J. 13, Q. B.

² *Atkyns v. Kinnier*, 19 L. J. 132, Ex.

³ *Reynolds v. Bridge*, sup.

⁴ *Mercer v. Irving*, 27 L. J. 291, Q. B.

the covenant is for the payment of a smaller sum, and the damages named in the deed are a much larger sum, the sum stated is to be regarded as a penalty ;” and that “when some of the stipulations in the covenant are of a certain nature and amount, and some are of an uncertain nature and amount, it would be right to say that as the sum could not be treated as liquidated damages in respect of one or more of the stipulations, it ought not to be so treated in respect of the others.”¹ The tendency of these cases, all of a recent date, had been to construe all such covenants literally as covenants to pay liquidated damages in the event of any clearly specified contingent breach. But the latest case has again restricted this construction; and the Court of Exchequer has held, apparently with reluctance, that a covenant to sell the goodwill and fixtures of a house at a valuation, payable on a certain day, with a proviso that in the event of either party not complying with every particular in the agreement, he should pay 50*l.* and expenses, is to be considered as a penalty, and not liquidated damages.² This decision is evidently within *Kemble v. Farren*, and is perhaps distinguishable from the cases which have been just cited, on the ground that the contingent breaches were expressed too generally, and the consequent damage was small necessarily, and matter of computation.

In breach of covenant, where the damages are unliquidated, as on a bond of indemnity, the measure is the amount which the jury think the plaintiff has lost by the breach or deterioration of his circumstances.³

Where a statute gives double or treble damages, the jury finds the damages simply ; and the amount recoverable will be doubled or trebled according to the statute.⁴

¹ Coleridge, J.: 26 L. J. 16, Q. B.

² *Betts v. Burch*, 33 L. T. Rep. 151.

³ *Walker v. Broadhurst*, 23 L. J. 71, Ex.

⁴ *Buckle v. Bewes*, 4 B. & C. 154.

MITIGATION OF DAMAGES.

Generally, in all actions of contract or tort for unliquidated damages, a defendant may give in evidence any extenuating circumstances, connected with the particular case, which tend to diminish the amount of his culpability, or to throw it to some extent on the plaintiff: and such circumstances will be properly considered by the jury or court in assessing damages. Thus, under non-assumpsit on a *quantum meruit* for goods sold, he may show the inferior quality of the goods;¹ or even where they have been sold with warranty, or by special contract, at a fixed price, and accepted;² but not where a latent defect, unaccompanied by fraud, is discovered after the lapse of a fixed time which has been allowed for trial.³ So, the defendant in breach of promise of marriage may show, in mitigation of damages, that, after making the promise with the knowledge that the plaintiff was a disreputable person, he was induced to break it on the representation and advice of his relations or friends:⁴ or that he had, subsequently to the promise, reasonable ground for suspecting her to be a disreputable person.⁵ If the evidence show that the plaintiff was a disreputable person at the time of the promise, and that the defendant did not know the fact, but discovered it subsequently, this will not only mitigate damages, but bar the action.⁶

So, in torts, the defendant in false imprisonment on

¹ *Cousins v. Paddon*, 2 C. M. & R. 547.

² *Mondel v. Steel*, 8 M. & W. 858.

³ *Sharp v. Great Western Railway*, 9 M. & W. 7.

⁴ *Irving v. Greenwood*, 1 C. & P. 350.

⁵ *Baddelsey v. Mortlock*, Holt, 151.

⁶ *Irving v. Greenwood*, 1 C. & P. 350.

a charge of felony may prove in mitigation that he had reasonable ground of suspicion.¹ In assault and battery, that the plaintiff had annoyed him by following him about ;² or by libelling,³ or otherwise provoking him : and generally, in all trespasses, facts which excuse, but do not justify, may be proved in mitigation. So, in trover, the defendant may show that he has returned the goods :⁴ in defamation, that the plaintiff had previously defamed the defendant, and that the latter knew it when he published the slander ;⁵ or that (under 6 & 7 Vict. c. 96, s. 1) the defendant had offered an apology before action brought, or as soon as he had an opportunity ; or that the plaintiff had misconstrued the words ;⁶ or even, it is said, that the slander was supported by rumours in the neighbourhood concerning the plaintiff: but this doctrine is very doubtful, and can only be considered as applicable to particular cases.⁷ In seduction the defendant may prove that the daughter has had intercourse with other men,⁸ or that she has been in the habit of using loose language.⁹

EXCESSIVE OR INADEQUATE DAMAGES.

The superior courts may and will in every case grant a new trial where the damages of the first trial are excessive: but, especially in torts, the court will not interfere unless the damages are clearly very excessive ; nor unless a strong case be made out that the jury

¹ *Clunn v. Morris*, R. & M. 424.

² *Thomas v. Powell*, 7 C. & P. 807.

³ *Fraser v. Berkeley*, 7 C. & P. 621.

⁴ 1 Roll. Abr. 5.

⁵ *Watts v. Fraser*, 7 A. & E. 223.

⁶ *Darby v. Ouseley*, 25 L. J. 227, Ex.

⁷ Rosc. N. P. 442.

⁸ *Dodd v. Norris*, 3 Camp. 519.

⁹ *Carpenter v. Wall*, 11 A. & E. 803.

have taken a perverted view of the matter.¹ Nor will the court interfere where the judge is not dissatisfied with the amount.² Thus, it has been held that 300*l.* are not necessarily excessive damages for an imprisonment of a few hours :³ nor 200*l.* in assault and battery, where both parties were gentlemen.⁴ So, 3500*l.* in a breach of promise of marriage against an attorney have been held to be not excessive ;⁵ and generally, a new trial, on the ground of the damages being excessive, will be refused, unless they are so large as to lead the court to infer that the jury were influenced by improper motives, or by a misconception of facts.⁶

It is the general practice not to grant a new trial on the ground that the damages are trifling and inadequate,⁷ although it is sometimes allowed.⁸ Where, on a breach of contract, no damage has been done, only nominal damages will be allowed.⁹

POWER OF A JUDGE OF THE SUPERIOR COURTS TO
ASSESS DAMAGES UNDER—

17 & 18 VICT. c. 125, s. 1.

By this section it is substantially enacted that parties to a cause may, by consent in writing, and leave of the court, leave any issue of fact to the decision of a judge without the intervention of a jury : “ and such issue of fact may thereupon be tried and determined, and damages assessed, where necessary, in open court, either

¹ *Tindal*, C. J. : 1 M. & G. 225 ; *Williams v. Currie*, 1 C. B. 841.

² *Button v. South Western Railway*, 27 L. J. 355, Ex.

³ *Lieman v. Allen*, 2 Wils. 160.

⁴ *Grey v. Grant*, 2 Wils. 252.

⁵ *Wood v. Hurd*, 2 Bing. N. C. 166.

⁶ *Thomas v. Harris*, 27 L. J. 353, Ex.

⁷ *Richards v. Rose*, 23 L. J. 3, Ex.

⁸ *Wilson v. Hicks*, 26 L. J. 242, Ex.

⁹ *Brown v. Price*, 26 L. J. 290. C. P.

in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at the assizes : and the verdict of such judge or judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned as being against the weight of evidence." Parties, therefore, who avail themselves of this section will have no ground for disputing the measure of damages as adopted by a judge : and its probable effect will be to extend, to a still wider extent, the equitable principles by which damages have been always measured.

Those principles have now been selected and illustrated according to the best of the present writer's judgment. It is impossible to exhaust such a subject in a treatise which is confined to practical and general principles : but something, it is hoped, has been done in this chapter to act up to the spirit of its object.

PART II.

ON WRITTEN EVIDENCE.

CHAPTER I.

IN the first part of this work the general principles of evidence, and their application to the issue, have been considered, chiefly in the form of oral depositions. In this second part, the principles of written, or documentary evidence, will be stated and illustrated. But it may be first desirable to elucidate more fully a branch of the subject which has been already touched upon;¹ and to show generally in what cases written instruments are treated as primary and best evidence, and in what cases as secondary and inferior evidence.

When a writing purports to be in the nature of a public or judicial record, the deliberate solemnities with which its settlement and recognition are presumed to have been accompanied render it clearly the best and primary evidence of the matters to which it refers. So, where a contract has been voluntarily confirmed by deed or writing between the parties, all controversy as to its purport and intention ought clearly to be determined by the inspection of the

¹ *Supra*, Chap. 4.

written instrument, in which both parties have professed to express all that bears substantially on the contract. It is therefore a fundamental principle that, although oral evidence may be given to explain such a written contract, it cannot be given to vary it. Similarly, where a writing is the very matter in issue, as in libel, oral evidence of the words of the libel is inadmissible as long as the writing, or print, is producible. So, where it appears that a representation or statement by a witness was made in writing, his own act operates against him in the nature of an estoppel in pais; and he will not be allowed to say what the statement was, but the writing must be produced, and declare it. Thus, a witness cannot be asked whether his name is written in a book; but the book must be produced, or its non-production be excused according to the principles under which secondary evidence is admissible.¹ Neither can he be examined as to its contents, but the whole letter must be read.² In all such cases oral evidence will be inadmissible, until it be proved that every endeavour has been used, without success, to produce the writing.

An anomalous exception to the rule that parol secondary evidence is inadmissible where there is parol primary evidence which ought strictly to be produced, is found in the principle that, "whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions must involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to or from such person, or that such person filled the character of assignee—which could only be by deed;" and the same learned judge adds that "the reason why such statements are admissible, without notice to produce or accounting for the absence of the

¹ *Darby v. Ouseley*. 25 L. J. 227, Ex.

² *Queen's case*, 2 B. & B. 286.

written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources when the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth from the very nature of the case, when better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question."¹ Thus, in the case in which this judgment was given, it was necessary to show that a certain debt was included in an insolvent's schedule. The schedule itself was tendered and rejected, because it was not duly stamped. Evidence was then tendered and rejected of a verbal admission by the defendant that the debt was included in the schedule. On a rule for a new trial, for improper rejection of this evidence, the court held that it ought to have been received, on the principle stated above.

This exception has excited much controversy,² and, if fully carried out, would act perhaps as a virtual abolition of the general rule with which it professes to be consistent; but it was sanctioned by the Court of Exchequer in a late case, although it is limited to cases in which the admission has been voluntary by the party making it; for he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed.³

Where a party gives a portion of a writing in evidence, the adverse party is entitled to have read all other passages which are "connected with, or construe, control, modify, qualify, or explain the passages which have been read;" but not distinct passages, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages.⁴

¹ Parke, B.: *Slatterie v. Pooley*, 6 M. & W. 668.

² Taylor, § 381-3, 2nd. edit.

³ *Darby v. Ouseley*, sup.

⁴ Pollock, C. B.: 25 L. J. 227, Ex.

Where the writing is merely in the nature of a personal memorandum, which has been drawn up by a witness for his own convenience, it is inadmissible as a writing, but may be used by the witness to refresh his memory. Thus, letters to a party are only received on the presumption that, by answering them, or acting on them, or even by the bare act of receiving them, he has connected them with the controversy between himself and the writer. But a mere written statement, not made on oath by one party, and not shown to have come to the knowledge and to have been recognised or adopted in some way by another party, is manifestly no evidence against such party.

It is on this principle that even depositions, which have been taken on oath in the presence of a party whom they affect, and who has had an opportunity of cross-examining, are inadmissible as long as the deponent can be produced at trial. Such depositions are merely personal statements which have not been in any way recognised, or acquiesced in, by the party against whom they are tendered. They contain none of the elements of a contract, or an admission ; and therefore, in this case, the deponent must state his evidence again, where it is possible, by word of mouth ; and his written deposition can only be used by him to refresh his memory, or be made the means of establishing a contradiction between his original and subsequent statements. In short, the general rule for determining whether a writing is primary or secondary evidence, is to consider whether it contains the substance of the issue, and is in the nature of a contract or an admission by the parties, or whether it is only a personal and *ex parte* memorandum. In the former case it must be produced as the best evidence ; in the latter it is admissible only to refresh and guide the memory of the witness in his oral depositions. Thus, records are in the nature of a contract between parties, which has been settled and ratified by public consent, as expressed in a judicial act. They are therefore primary evidence. But a public act of Parliament is

in the nature of a memorandum, for judges and the public, of laws which every one is presumed to have engraven in his memory.¹ Such is the legal fiction, and such appears to be the principle on which even an act printed by the Queen's printers is best evidence, although it may also be regarded in the nature of a social and national contract.

Writings are either public or private; and public writings are either judicial or non-judicial. These will now be treated in consecutive order.

¹ Lord Ellenborough : *R. v. Sutton*, 4 M. & S. 542.

CHAPTER II.

ON PUBLIC AND JUDICIAL WRITINGS.

THE courts take judicial notice of numerous facts, chiefly in writing or print; it is therefore unnecessary to prove them.

They notice all the public statutes of the realm;¹ their own course of procedure and practice;² the maritime law of nations;³ and a war in which the country is engaged, but not a war between foreign countries;⁴ the great and privy seals;⁵ royal proclamations; the preamble of an act;⁶ and now, by 8 & 9 Vict. c. 113, s. 3, all copies of royal proclamations, purporting to be printed by the Queen's printer, are made evidence thereof in all courts, without proof being given that such copies were so printed. They will also notice the almanacs and the divisions of the year,⁷ and the London Gazette.⁸

But they will not notice the laws or customs of foreign states; and such laws must be proved by skilled witnesses.⁹ So also must colonial laws,¹⁰ and

¹ Bull. N. P. 222.

² *Pugh v. Robinson*, 1 T. R. 118.

³ *Chandler v. Grieves*, 2 H. Bl. 606, n.

⁴ *Dolder v. Huntingfield*, 11 Ves. jun. 292.

⁵ 29 How. St. Tr. 707.

⁶ *R. v. Sutton*, 4 M. & S. 532.

⁷ *Brough v. Parkins*, Lord Raym. 993.

⁸ *R. v. Forsyth*, R. & R. 274.

⁹ *Mostyn v. Fabrigas*, 1 Sm. L. C. notes.

¹⁰ *Wey v. Galley*, 6 Mod. 194.

the laws of Scotland; but it does not appear to be absolutely necessary that the witness should be a lawyer; but it will be enough if he appear to be conversant with the foreign law.¹ Thus, to prove a marriage in Scotland to have been valid according to the laws of Scotland, it is necessary to call a witness conversant with Scotch law.²

By the 8 & 9 Vict. c. 113, s. 1, it is enacted that, whenever by any act then in force, or thereafter to be in force, "any certificate, official, or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either house; or in any judicial proceeding; the same shall be respectively admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary; or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

Sect. 2. "That all courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

¹ *R. v. Povey*, 22 L. J. 19.

² *Ibid.*

ACTS OF PARLIAMENT.

These are either public or private. The former are, theoretically, not proved, as the court takes cognisance of them; but, practically, they are proved generally by copies purporting to be printed and published by the Queen's printer; and this course seems to be implied from the terms of 41 Geo. 3, c. 90, s. 9, which enacts that the statutes of England and of Great Britain, printed and published by the King's printer, shall be received as conclusive evidence in the Irish courts; and the statutes of Ireland prior to the Union, so printed and published, shall be received in like manner in any court of civil or criminal jurisdiction in Great Britain. If there be ground for supposing the printed copy inaccurate, reference should be had to the Parliament Roll.¹

Private, local, and personal acts, which are not public acts, are proved under the Documentary Evidence Act (8 & 9 Vict. c. 113, s. 3), by copies purporting to be printed by the Queen's printer, without necessarily any further proof that they were so printed. But even this proof is unnecessary if the act contains a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded.² But such a clause will not render it evidence against third parties.³

The same section also declares that all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or of either house, shall be admitted in all cases as evidence thereof without proof of their being copies so printed.

¹ *Price v. Hollis*, 1 M. & S. 105.

² *Woodward v. Cotton*, 1 C. M. & R. 44.

³ *Brett v. Beales*, M. & M. 421.

RECORDS.

Where the existence of a record is in issue on a plea of *nul tiel record*, either the record itself must be produced, or it may be proved by exemplification under the great seal, or by an examined or sworn copy. But when the validity of the record is not in issue, it may be proved always by an examined or sworn copy.

By the 1 & 2 Vict. c. 94, the Master of the Rolls is made superintendent of the general records of the realm, and is empowered to make rules for the admission of such persons as ought to be admitted to the use of such records: and he is authorized personally, or by deputy, to allow copies to be made of such records. It is also declared to be expedient "to allow the free use of any public records as far as stands with their safety and integrity, and with the public policy of the realm." By sect. 13, a certified copy of any record, sealed with the seal of the Record Office, is evidence in every case in which the original record would be admissible; and by the 12th section, any person desirous of procuring such a copy may do so at his own cost by permission of the Master of the Rolls: but such copy shall be admissible to prove the record, only after examination and certificate, under seal, by the Deputy Keeper of the Records, or one of the Assistant Record Keepers. The proceedings of the Petty Bag Office, the Enrolment Office in Chancery, and the Common Law side of the Court of Chancery, are also proved by sealed and certified copies issuing out of such respective offices: (12 & 13 Vict. c. 109, ss. 13 and 17.) Certified copies of bankruptcy proceedings, sealed by the proper officer (12 & 13 Vict. c. 106, s. 236), and similar copies of insolvency proceedings (1 & 2 Vict. c. 110, s. 105), signed and sealed by the proper officer, are sufficient evidence of such proceedings.

By the 9 & 10 Vict. c. 95, s. 111, the clerks of County Courts are required to enter notes of all proceedings in such courts, in a book belonging to the court: "and such entries in the said book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted, in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof."

But, although all judicial proceedings, which are regulated as to the mode of proving them by the above statutes, should be proved conformably to them, yet as their language is declaratory and directory, not compulsory, the records of superior and inferior courts may still be proved, as at common law, by means of examined copies, when they are attainable. An examined copy must be proved to be such by a witness who has compared the copy word for word with the original; or who has examined the copy while another person read the original; and it will not be necessary to call the latter person, nor to prove that the witness also read the original while the other person compared the copy; for it will not be presumed that a person has wilfully misread a record.¹ But the copy must be complete and accurate, and not contain abbreviations:² and it must appear that the record was in the custody of the proper officer at the time when the copy was taken.

The minutes of a judgment, or a copy of such minutes from which the record is to be made up, are not evidence of the record: but the record is complete only when made up and engrossed.³ Accordingly, the minute book of a clerk of the peace of proceedings at quarter sessions, is not evidence, *e. g.*

¹ *Read v. Margison*, 1 Camp. 469; *s. v. Slane Peerage case*, 5 Cl. & Fin. 23.

² C. & M. 388.

³ 2 Phill. 201.

to show that an indictment was there found against A. B., but the record must be made up and produced, or an examined copy of it.¹

A former conviction or acquittal may now be proved under the 14 & 15 Vict. c. 99, s. 13, by a certificate purporting to be "under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof."

On trials for perjury it is enacted by the 14 & 15 Vict. c. 100, s. 22, that such a certificate, "containing the substance and effect only, omitting the formal portion of the indictment and trial for any felony or misdemeanor," shall be sufficient evidence of the same. But the mere fact of the trial may be proved by the officer of the court on production of his minutes; or apparently by any one who was present at the first trial.²

VERDICTS.

A verdict may be proved by producing the *postea*, indorsed on the Nisi Prius record, where it is only required to show that a trial took place.³ But the whole record and a copy of the judgment will be necessary to establish the finding of any substantial fact.⁴

DEPOSITIONS.

A copy of depositions sworn at a judge's chambers, delivered out by his clerk, and attested by the judge's signature, is evidence, without proof that it has been compared with the original.⁵

¹ *R. v. Smith*, 8 B. & C. 341.

² *R. v. Newman*, 21 L. J. 75, M. C.

³ *Pelton v. Walter*, 1 Stra. 162.

⁴ 2 Phill. 204.

⁵ 1 Camp. 101.

FOREIGN AND COLONIAL JUDGMENTS, ETC.

These are now regulated by 14 & 15 Vict. c. 99, s. 7, which enacts, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs: and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be received in evidence without any proof of the seal where a seal is necessary, or of the signature or of the statement attached thereto, where such statement or signature are necessary, or of the judicial character of the

person appearing to have made such signature and statement."

But foreign and colonial judgments and other proceedings may still be proved, as before the statute, by examined copies.¹

Foreign laws, as already stated,² must be proved by skilled witnesses: and the courts will not take judicial notice of them, but require them to be proved as ordinary facts. It is held that the witness must either be a professional man, such as an advocate or a judge; or connected in such a way with the profession, or to have had such daily experience of the law in question, as to create a reasonable presumption that he has a competent knowledge of it.³ But no witness will be competent unless he appear either to have filled an official position, or to be connected manifestly with the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with the law.⁴ Accordingly, a person who formerly carried on business as a merchant and commissioner of stocks at Brussels has been allowed to prove what the law of Belgium is as to the presentment of promissory notes there.⁵ But a person who has acquired, by study in one country, a merely theoretical knowledge of the laws of another country, is not competent to prove the laws of such country.⁶

A foreign proclamation, contained in a printed placard, may be proved by production of a copy proved to be similar; but a verbal proclamation is inadmissible as hearsay. In the former case it appears also that the proclamation is in the nature of an inscription or act done, and may be proved by oral evidence.⁷

¹ *Appleton v. Braybrooke*, 6 M. & G. 34.

² *Supra*, p. 280.

³ *Sussex Peerage Case*, 11 Cl. & Fin. 134.

⁴ *Van Der Doucht v. Thelluson*, 8 C. B. 2.

⁵ *Ibid.*

⁶ *Bristow v. Secqueville*, 5 Exch. 275.

⁷ Cf. *sup.* p. 89.

PROCEEDINGS IN CHANCERY.

A decree in Chancery may be proved by an exemplification under the court seal ; or by an examined copy, or by a decretal order, or paper, with proof of the bill and answer.¹

If it be required only to show that a decree was made, or that it has been reversed, the enrolled and sealed decree is sufficient, without producing the bill and answer.²

A bill or answer is no evidence of the facts contained in it, not even of those on which the prayer of relief is founded.³

But where the parties to a suit are parties in an action in which the same matters are in issue, the statements of either, in a bill or answer, are evidence against the maker in the nature of admissions.⁴ And where a witness at the trial gives evidence at variance with statements which he has made in an answer in Chancery, an examined copy of such answer will be admissible to contradict him.⁵

It is not within the plan of this work to treat of evidence in the Court of Chancery ; but it may be stated shortly that such evidence is taken, in ordinary course, on affidavits of the parties ; but either party may, by leave of the court, obtain an order to have the evidence taken orally before an examiner of the court. In this case the witnesses are summoned, examined, and cross-examined by counsel, according to the practice of the common law courts ; and their depositions are taken and returned to the court, according to the practice in examinations under commissions.⁶

¹ *Trowell v. Castle*, 1 Keb. 21.

² B. N. P. 735.

³ *Doe d. Bowerman v. Sybourn*, 7 T. R. 2. .

⁴ *Hodgkinson v. Willis*, 3 Camp. 401.

⁵ *Ewer v. Ambrose*, 4 B. & C. 25.

⁶ 15 & 16 Vict. c. 86, ss. 29-40 ; see Appendix.

WRITS.

The writ itself must be produced, or its non-production accounted for, when secondary evidence of it will be admissible. But where the writ is the gist of the action, it ought to be proved by the record, or an authorized copy.¹

AFFIDAVITS.

A voluntary affidavit is only evidence in the nature of an admission against the party making it.² It may be proved, when filed, by office or examined copies.

CONVICTIONS.

Convictions before magistrates are proved by examined copies, which are made out, on application, by the clerk of the peace. In many cases also, under particular statutes, copies certified by the proper officer are sufficient evidence.

In trespass against justices, a conviction, unappealed against and unreversed, cannot be controverted in evidence;³ and, until quashed, it is conclusive evidence of the facts contained in it in favour of the justice against whom it is tendered.⁴

ORDERS.

The original order, as in cases of removal, must be produced if possible; but secondary evidence may be given of it, if it appear that the party, whose duty it is to produce it, has been served with notice.⁵ But where the order refers to proceedings which are not strictly judicial, and which are also extrinsic to the

¹ B. N. P. 234.

² Ibid. 242.

³ *Fawcett v. Fowler*, 7 B. & C. 394.

⁴ *Strickland v. Ward*, 7 T. R. 633.

⁵ *R. v. Justices of Peterborough*, 18 L. J. 79, M. C.

controversy between the parties, the person in whose custody such documentary evidence is must be subpoenaed to produce it; and, if he refuse to appear, secondary evidence cannot be given, but the recusant witness may be attached.¹

INQUISITIONS

Are in the nature of judicial inquiries into matters of public importance; and they are admissible under the limitations which have been already discussed in the chapters on public or general interests, and ancient possession.

An inquisition of lunacy is evidence for a prisoner to show that he was insane when he committed the offence.²

ORDERS AND RULES OF THE SUPERIOR COURTS.

The orders of the judges of the superior courts are proved by the production of the original order, signed by the judge. The courts take official notice of the signature. The rules of the superior common law courts may be proved by an office copy, made out by the clerk of the rules or other proper officer.³

But a judge's order will not justify a party in tendering secondary evidence, merely because the order refers to it as if it were primary. Thus, where a judge's order required a party to admit "a copy of a letter," it was held that such party could not give it in evidence, without accounting first for the non-pro-

¹ *R. v. Llanfaethly*, 23 L. J. 33, M. C.

² 2 Phill. 129.

³ *Duncan v. Scott*, 1 Camp. 102.

duction of the original. "The judge's order," Lord Denman said, "secures the accuracy of the secondary evidence, but does not give it the effect of primary evidence."¹

By the 12 & 13 Vict. c. 109, s. 13, office copies of all records and documents belonging to the common law side of the Court of Chancery, are admissible and sufficient evidence. This section enacts, "that every document sealed" with the common law seal of the Court of Chancery, and purporting to be a copy of any record or document of any description, shall be deemed to be a true copy, "and shall, without further proof, be admitted as evidence before all courts and persons, in like manner, and to the same extent and effect, as the original record or document would be admissible, as well for the purpose of proving the contents of such record or document, as of proving that such record or document belongs to the Court of Chancery, but not further or otherwise."

CERTIFICATES.

A copy of a record of any public fact made by an officer in a public or judicial capacity, and strictly within the course of his duty (but not otherwise), is generally, and in many cases specially by statute, evidence of the facts which it purports to record.² But a mere certificate of an extra-judicial fact, or of a fact which the officer was not bound to record, is inadmissible.³

In criminal law, various certificates containing the substance of the original record are evidence. Thus, by 7 & 8 Geo. 4, c. 18, s. 11, and 14 & 15 Vict. c. 19, s. 2, it is substantially enacted that whenever a prisoner

¹ *Sharp v. Lamb*, 11 A. & E. 805.

² *Sup.* p. 54.

³ *Ibid.*

shall be charged with a felony or misdemeanor, after a previous conviction for a felony or misdemeanor, the first offence and conviction may be proved by a certificate, containing the substance of the original record, and purporting to be signed by the clerk of the court, or other officer having the custody of the records. The 2 Will. 4, c. 34, s. 9, has a similar provision for offences against the coin.

So the 14 & 15 Vict. c. 99, s. 13, enacts that whenever it may be necessary to prove a formal conviction or acquittal of a prisoner, it shall not be necessary to produce the original record or a copy; but it shall be sufficient to produce a certificate of such former conviction or acquittal, purporting to contain the substance of the original record, and signed by the clerk of the court or other proper officer.

The 14 & 15 Vict. c. 100, s. 22, enacts that in trials for perjury or subornation of perjury, or a trial of any indictment for felony or misdemeanor, a certificate of the trial of such indictment, purporting to be signed by the clerk of the court or of the records, shall be sufficient evidence of the former trial.

A multitude of other documents, in the nature of copies or certificates, are admissible in substitution for originals, or *per se*, by virtue of special acts; but the limits of this work permit only a general reference to them. They are generally admissible under the Documentary Evidence Act, but are also in many cases made specially admissible by statute. Thus, certificates of the chargeability of paupers purporting to be signed and sealed by the chairman of the board, and countersigned by the clerk, are *prima facie* evidence of such chargeability: (7 & 8 Vict. c. 101, s. 69.) Certificates of settlement, purporting to be allowed and subscribed by two justices of the county in which the parish lies, and otherwise formally executed, are receivable under 8 & 9 Will. 3, c. 30, s. 1.

A certificate by two justices that a charge of assault and battery had been heard and dismissed, is admis-

sible, under 9 Geo. 4, c. 31, s. 27, to bar all subsequent civil and criminal proceedings.¹

So, under the Juvenile Offenders Act, 10 & 11 Vict. c. 82, ss. 1 and 3, a similar certificate of dismissal or conviction by two justices, is evidence in bar of all subsequent proceedings. And under the recent Larceny Jurisdiction Act, 18 & 19 Vict. c. 126, s. 12, a similar certificate has a similar effect.

WRITS AND WARRANTS,

It is said, must be proved, until they are returned, by actual production; after their return they become matters of record, and are provable by copies.² Writs of summons, or of execution, which have been renewed under the 15 & 16 Vict. c. 76, ss. 12 and 125, must be produced, and appear to have been impressed with the seal of the court.

ORDERS AND RULES OF THE INFERIOR COURTS.

Where these are in the nature of a record, they will be subject to the usual rule, and may generally be proved by a certified exemplification.³ But where the court is not of record, the books containing the proceedings must be produced and proved by the proper officer, who ought to be subpoenaed to attend with them; but if he do not attend, or if he refuse to produce the book or document containing the order or rule, secondary evidence cannot be given, but the officer may be attached.⁴

¹ *Tunnicliffe v. Tedd*, 5 C. B. 553.

² Bull N. P. 234; Tayl. 1221.

³ *Woodcraft v. Keynaston*, 2 Atk. 317.

⁴ *R. v. Llanfaethly*, 23 L. J. 33, M. C.

BANKRUPTCY PROCEEDINGS

Are proved according to the provisions of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. The 236th section enacts "that any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition or other proceeding, or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted, in all courts whatever, as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof; and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided."

A certificate of conformity and discharge under this act (schedule Z) must be in writing under the seal of the court, and signed by the commissioner. Warrants must be under the seal of the court, and signed by one commissioner; and summonses must be under the writing of a commissioner, or, in his absence, under the hand of a registrar and the seal of the court.

Declarations of insolvency under the Bankrupt Act, and minutes of arrangements with creditors, may be proved by copies purporting to be certified by the chief registrar of the Court of Bankruptcy, or any of his clerks, to be true copies, to prove that such declarations or minutes have been filed.¹ In country

¹ 12 & 13 Vict. c. 136, s. 238; 15 & 16 Vict. c. 77, ss. 2, 6.

districts, these certificates may be granted by the registrar of the district.¹

INSOLVENCY

Proceedings are regulated by the 1 & 2 Vict. c. 110, s. 105 (the Insolvent Act), by which it is declared that certified copies of such proceedings, purporting to be signed by the officer in whose custody the same shall be, and to be sealed with the seal of the court, are to be admissible in all courts.

By the 46th section of the same act, a copy of any vesting order, or of any appointment of assignees, "such copy being made upon parchment, and purporting to have the certificate of the provisional assignee of the said court, or of his deputy appointed for that purpose, endorsed thereon, and to be sealed with the seal of the court," shall be received as sufficient evidence of such order or appointment. But a copy of the appointment of an assignee made upon paper, and bearing the seal of the court, will be admissible;² and a copy, purporting to be signed by the deputy of a provisional assignee, is sufficient without proof of the appointment of such deputy.³ It is also held that a copy of an assignment from the provisional assignee is sufficient, without proof of the filing of the petition or the appointment of the assignee.⁴

¹ 17 & 18 Vict. c. 119, ss. 16, 17, 19.

² *Hounsfield v. Drury*, 11 A. & E. 98.

³ *Jackson v. Thompson*, 2 Q. B. 887.

⁴ *Doe d. Hemming v. Willetts*, 7 C. B. 709; see 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96, s. 17; 10 & 11 Vict. c. 102, s. 6.

PROBATES—WILLS.

A probate is in the nature of a judicial proceeding or record of the Ecclesiastical Court. It constitutes the proper legal proof of title in an executor to his testator's personalty, and is conclusive against all the world.¹ It is a copy of the will, sealed with the seal of the Ecclesiastical Court, and attached to a certificate which states that the will has been proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.² The will itself is not evidence;³ but if the probate be lost, it either may be proved by an examined copy,⁴ or the court will grant an exemplification, but not another probate;⁵ or a certified copy of the entry in the act book, under 14 & 15 Vict. c. 99, s. 14, is sufficient. The act book itself will also be evidence, without accounting for the non-production of the probate.⁶ And under 14 & 15 Vict. c. 100, s. 14, an unstamped copy of the act book has been received as evidence of probate, to prove an executor's title: (*Dorrett v. Meux*, 23 L. J. 221, C. P.) Where no act book is kept, or other record of probates, it appears that the will itself, indorsed with the appointment of the executor, will be evidence.⁷ The same remarks apply to letters of administration.⁸

By 20 & 21 Vict. c. 77, s. 22, probates, &c., purporting to be sealed with the seal of the new Court of Probate, shall in all parts of the United Kingdom be received as evidence thereof.

¹ *Allen v. Dundas*, 3 T. R. 125.

² Toller on Ex. 58.

³ *Pinney v. Pinney*, 8 B. & C. 335.

⁴ Tayl. 1223.

⁵ *Shepherd v. Shorthose*, 1 Stra. 412.

⁶ *Cox v. Allingham*, Jacob. 514.

⁷ *Doe v. Mew*, 7 A. & E. 240.

⁸ *Noel v. Wells*, 1 Lev. 352.

If the will relate to lands, or any description of realty, it was necessary formerly to produce the original will.¹ But now a devise of real estate may be proved by probate, or a sealed office copy from the Court of Probate; but in this case the person tendering the evidence must give ten days' notice before trial to the other party, who may object in four days after receipt of the notice, that he disputes the validity of the devise. In this case the original must still be produced.²

One of the witnesses must be called who can speak to the attestation; ³ and who can testify either that he saw the testator sign, or that he heard him acknowledge to the witness, or in his presence, that the will is his.⁴ If an issue of *devisavit vel non* be directed out of Chancery, all the witnesses must be called.⁵ The witnesses must also appear to have subscribed either actually in the presence of the testator, or so near to him that, although he did not see them sign, he might have seen them without the necessity of locomotion. Thus, where the witnesses were in one room, and the testator in another; and the latter, although he did not see them sign, might have seen them through a window; the will was held good: ⁶ but not so where the testator could not have seen them without changing his position.⁷

If the witnesses be dead, their handwriting must be proved, unless the will be thirty years old, in which case it is said to prove itself; that is, if it be produced from the proper custody, and be otherwise apparently authentic, it will be presumed to be so. The thirty years are computed from the date of the will.⁸ In

¹ *Doe v. Calvert*, 2 Camp. 389.

² 20 & 21 Vict. c. 77, s. 65.

³ B. N. P. 264.

⁴ *Stonehouse v. Evelyn*, 3 P. Wms. 113.

⁵ *Bootle v. Blundell*, 19 Ves. 494.

⁶ *Shires v. Glascock*, 2 Salk. 688.

⁷ *Doe v. Manifold*, 1 M. & S. 294.

⁸ *M'Kenire v. Fraser*, 9 Ves. 5.

such a case it is not necessary to call any one of the alleged witnesses, even though they appear to be living : ¹ (see, generally, the Wills Act, 1 Vict. c. 26.)

AWARDS.

An award is conclusive evidence of all the substantial matters to which the submission refers, as between the parties to the submission, but not as to third parties.²

In proving an award, the first step is to prove the submission to the reference. If the submission be a written agreement, the execution by all the parties, including the party who relies on it, must be strictly proved : ³ but if the submission be by a rule of court, or judge's order in an action, it will be sufficient to produce the rule or order, and then to prove the award.⁴ When the submission contains any special powers which have been exercised, *e. g.*, to enlarge the time, or appoint an umpire, the instrument by which such power has been exercised must be proved, in addition to the submission and prior to the proof of the award ; and a recital in the award of the exercise of the power will not be sufficient.⁵ The award must also be proved to have been duly executed. When there are several arbitrators, it should be shown that all signed in the presence of each other ; and even where the award is to be valid, although signed by only one, or less than the actual number of arbitrators, it should appear that all who have not signed have been required to attend.⁶

¹ *Doe v. Wolley*, 8 B. & C. 22.

² *Lady Denman v. Muckenzie*, 25 L. J. 44, Q. B.

³ *Ferris v. Oven*, 7 B. & C. 427 ; *Brazin v. Jones*, 8 B. & C. 124.

⁴ *Gisborne v. Hart*, 5 M. & W. 50.

⁵ *Still v. Halford*, 4 Camp. 19.

⁶ *Stalworth v. Inns*, 13 M. & W. 466 ; *Wright v. Graham*, 3 Exch. 181.

Awards by public officers are received with less stringent proof, on the principle *omnia præsumuntur ritè esse acta*.¹ Also, under several of the Inclosure Acts, awards made by the the commissioners are to be conclusive evidence that all statutory preliminaries have been observed : (9 & 10 Vict. c. 70 ; 10 & 11 Vict. c. 111 ; 11 & 12 Vict. c. 99.)

¹ *R. v. Haslingfield*, 2 M. & S. 558 ; sup. p. 56.

CHAPTER III.

ON DEPOSITIONS.

IN the preceding chapter the character and formal proof of writings of a public and judicial nature have been considered. In the present chapter the writings are of the same character ; but since they are comprised under a large general title, they will be considered conveniently in a separate division.

Depositions are secondary evidence, and are generally inadmissible where the original witness can be produced ; but admissible in certain cases, and subject to certain common law and statutory restrictions, when he cannot be produced. The principle of this exclusion in the first instance rests on the hearsay nature of such evidence, and the prejudice to the adverse party who loses the benefit of his cross-examination.

Absolutely and universally, they are inadmissible when such party has had no opportunity of controlling and explaining the evidence at the time of deposition, by cross-examining the deponent. But where he has had such opportunity, he is, in certain instances where public policy recommends such a course, affected by such testimony of an absent witness.

Thus, a voluntary affidavit, as already stated,¹ is no evidence against another, for the courts will never try a question of fact on affidavits. A deposition, also, to be in any case admissible, must refer to the same

¹ *Supra*, .p. 289.

parties, or their privies, and where there is the same substantial issue. It is on this principle that the evidence of a witness in a former action may, after his decease, be read in a subsequent action.¹ Thus, also, in criminal cases, a deposition taken on one charge cannot be read on a different charge. But it is sufficient in such a case that the charges should be substantially identical, or so connected as to create a reasonable presumption that the prisoner's mind, at the time of the first charge, was sufficiently directed to the matters which form the substance of the subsequent charge. Thus, where the prisoner was charged before magistrates with wounding A. with intent to do her some grievous bodily harm, and was afterwards indicted for wounding A., A.'s deposition on the original charge was received on the subsequent charge, because the prisoner had had necessarily full opportunity of cross-examining A.²

Where the deposition is received, it operates as a complete substitution for the evidence of the witness.³ But if it be wanting in any statutory formalities, as, if it be not signed by the magistrate or coroner,⁴ or if it contain hearsay, such as a letter purporting to have been written by the deponent but not produced, the deposition will, in the former case, be wholly inadmissible, and in the latter, the part purporting to recite the letter must be omitted.⁵

We proceed to consider—

DEPOSITIONS IN CRIMINAL CASES.

At common law, depositions taken in the presence of a prisoner before a magistrate, and signed by the latter, were generally evidence against the prisoner on his

¹ *Wright v. Doe d. Tatham*, 1 A. & E. 3.

² *R. v. Beeston*, 24 L. J. 5, M. C.

³ 2 Phill. 85.

⁴ *R. v. England*, 2 Lea. C. C. 770.

⁵ *Tufton v. Whitmore*, 12 A. & E. 370.

[EV.]

trial if it appeared that he had had an opportunity of cross-examining the witness, and that the witness at the time of trial was either dead, or permanently unable to travel, owing to illness, or that he had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, in order to prevent him from giving evidence against him.

The admissibility of these depositions is now subject to the 11 & 12 Vict. c. 42, s. 17, by which it is enacted, that in all cases where any person shall be charged before any justice of the peace with any indictable offence, "such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or writing of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness be examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person, whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel; and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof

thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

Before a deposition can be received under this section it must therefore appear—

1. That it was taken in the presence of the prisoner, and that he either cross-examined, or had an opportunity of cross-examining, the deponent.

2. That it has been signed by the witness and also by the magistrate. The Christian name of the witness may be proved by any one who saw the witness sign.¹

3. That it was made on oath by the witness, or on affirmation, in such cases only in which an affirmation is allowed.

4. That the deponent is either dead, or so ill as not to be able to travel.

Only the first and last of these conditions is required to be distinctly proved, and the last is usually proved first. The signatures, purporting to be authentic, are presumed to be so until proved to be otherwise; and the deposition is declared on the face of it to be taken on oath.

It is not enough to show that the deposition purports to be signed by the magistrate, but it must also be shown affirmatively by the prosecutor that the deposition was taken in the presence of the prisoner, and that he or his counsel or attorney had a full opportunity of cross-examining the witness; and, when the prisoner is not attended by counsel or attorney, it ought also to appear that the magistrate had asked him whether he would like to cross-examine, and that he had allowed the prisoner sufficient time to consider what questions he would put.²

It is to be observed on the last condition, that it does not contain all the circumstances in which a

¹ *R. v. Foote*, 26 L. J. 79, M. C.

² Platt, B.: *R. v. Day*, 19 L. T. 35.

deposition is generally admissible. Thus, before the statute, the deposition was received at common law, not merely on proof that the deponent was either dead or so ill as to be unable to travel, but if he were proved to have become permanently insane,¹ or to be actually insane at the time of trial with a possibility of recovery.² So, it neither was nor is necessary to show that the illness under which a deponent is suffering is of a permanent, or of more than a temporary nature. But where the illness of the witness is proved to be of a very transitory nature, the judge may and will, in his discretion, postpone the trial until he recover; and this is the proper course whenever such postponement does not clearly clash with public convenience.

But the illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health.³ It is desirable, when it is possible, to prove this fact by a medical attendant, but it may be proved by any one who has seen and examined the deponent recently. The court will inquire scrupulously and even suspiciously into all these circumstances before receiving the deposition; and will reject it when the alleged illness appears to be not dangerous or serious enough to excuse the absence of the deponent. Thus, at the Salisbury Spring Assizes, 1853, Crompton, J., held that the fact of a woman being within a month of her confinement was insufficient, in her absence, to render her deposition admissible. But immediately after, at Exeter, the same learned judge considered that it might be received when it appeared, in such a case, that the woman was expecting every hour to be confined. So, where a witness had had an attack of paralysis, his deposition was read, although it would not have endangered his life to come into

¹ *R. v. Eriswell*, 3 T. R. 707.

² *R. v. Marshall*, C. & M. 147.

³ *R. v. Day*, 19 L. T. 35.

court. But in this case the deponent could neither hear nor speak.¹

It is also decided that, as before the statute, a deposition will be received if the deponent be proved to have been kept out of the way and prevented from appearing at the trial, by the act of the prisoner, or by collusion with him or his friends.² This was expressly decided in *R. v. Scaife*, where the deponent was kept out of the way by the prisoner's agents; but it is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorized or sanctioned by him to procure the absence of the witness.³ But in such a case the deposition is evidence only against the prisoner who procured the absence of the deponent, and not against other prisoners in the same indictment who are not implicated in the collusion.⁴

Unless the absence of the witness be accounted for in some one of these ways, his deposition cannot be received, because it will retain all its original and unsatisfactory incidents as hearsay evidence. When the deponent is in a foreign country, his deposition cannot be read.⁵

Each deposition ought to be separately signed by the magistrate; but in one case, before the statute, where the deposition of a deceased witness was first on the same sheet of paper with the depositions of two other witnesses, and the magistrate's signature was at the end only of the last deposition, but was not in terms confined to it; Coleridge, J., after conferring with Lord Abinger, received the first deposition, but with the remark that it would have been bad in an affidavit.⁶ But it seems to have been the impression

¹ *R. v. Cockburn*, 26 L. J. 136, M. C.

² *R. v. Gutteridge*, 9 C. & P. 471; *R. v. Scaife*, 20 L. J. 229, M. C.

³ Chitty's Statutes, vol. 2, p. 38, n.

⁴ *R. v. Scaife*, *supra*.

⁵ *R. v. Austin*, 25 L. J. 48, M. C.

⁶ *R. v. Osborne*, 8 C. & P. 113.

of the learned judge in this case, that each deposition ought, strictly, to be separately signed by the committing magistrate; and the language of the 17th section of the 11 & 12 Vict. c. 42, appears to point out distinctly that such is the correct practice; for it declares the deposition to be admissible "if such deposition purport to be signed by the justice," and that it shall be inadmissible if "it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." It seems clear that "deposition" here is used in the singular, and applies only to the separate statement of the deceased or absent witness, and not to the aggregate mass of the distinct sheets of the whole depositions. It is, therefore, apprehended that, according to the manifest words of the section, if the deposition of a deceased or absent witness is not signed by the magistrate at the foot of such statement, although it may be used for purposes of contradicting the evidence, or refreshing the memory of a present witness, it is not, in any case, evidence in his absence against a prisoner. This is clearly also the justice of the case; for depositions, as being in the nature of hearsay, and as tending to affect the liberty of the subject, in opposition to the principle which entitles every man to be confronted by his accuser, ought clearly to be received, if received at all, only when every legal formality has been observed, and when, especially, the signature of the magistrate, counter-signing and following immediately on that of the witness, may be presumed to afford a reasonable guarantee that the written deposition corresponds exactly with the verbal statement. Such a guarantee of accuracy is clearly of a far higher nature than that which is contained in a single signature at the end of the whole depositions of numerous witnesses, contained on separate sheets which have no necessary connection.

It is therefore considered that, in the case under consideration, the deposition of every witness ought to be separately signed by the committing magistrate;

and that it is inadmissible unless it be so signed. It is believed, also, to be the common practice of committing magistrates to sign each deposition ; but it is right to observe that, although this course seems to be pointed out clearly by the 17th section of the 11 & 12 Vict. c. 42, it is not expressly required by the form M. in the appendix to the act. The 28th section also declares that the "several forms in the schedule, or forms to the same or like effect, shall be deemed good, valid, and sufficient in law;" and this raises the question how far the omission in the form, as sanctioned by the 28th section, is affected by the 17th section, and how far matter in the nature of parol evidence may and ought to be imported into the form in order to explain, complete, and reconcile it with the 17th section. It is unnecessary to pursue this inquiry ; but the safe and strictly legal practice is apprehended to continue as it existed before the statute, and that, in the words of Lord Denman, "it is the magistrate's duty to sign every deposition (the witness having first signed it) as the proceedings go on."¹

The depositions before a magistrate against a prisoner must be taken in the presence both of the magistrate and of the prisoner ; and nothing should be returned as a deposition against the prisoner unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition.²

But it is said not to be necessary that the prisoner should be present at the examination before a coroner, in order to render the deposition admissible. This appears to be doubtful.³

The depositions of witnesses who have been examined on behalf of the prisoner ought to be returned with the depositions of the witnesses for the prosecution ;

¹ *R. v. Lord Mayor of London*, 5 Q. B. 564 ; cf. *Justices of Staffordshire*, 23 L. J. 17, M. C.

² Lord Denman : *R. v. Arnold*, 8 C. & P. 621.

³ Wels. Cr. Pr. 210 ; 2 Phill. 109.

but they are not, apparently, evidence for the prisoner.¹

If the depositions are lost without fraud or gross negligence before trial, and cannot be found after diligent search, they may be proved by a copy produced and certified by the magistrate's clerk ;² and now, probably, under 14 & 15 Vict. c. 99, s. 14, any duly-examined copy would be admissible.

Every deposition against a prisoner ought to be taken down in writing, whether any case is made out or not; and Jervis, C. J., has declared it to be "a practice quite illegal and highly improper" not to take down in writing every such deposition. Accordingly, the court will require distinct evidence that it has not been so taken down, before it will admit secondary parole evidence of anything that was said on an examination before a magistrate.³

The prisoner's statement will be limited, as to its admissibility in the first instance, by the principles laid down in the chapter on Confessions, and the statutory provisions which are there mentioned.⁴

A voluntary statement made by a prisoner before a magistrate ought to be reduced into writing, and read as evidence against or for him in the case for the prosecution at trial.

It is desirable, but not necessary, that the prisoner should sign the statement ; and it is said not to be necessary that the magistrate should sign it, if the prisoner sign or admit the statement to be true when it is read over to him ; but a statement not signed by the magistrate, and neither signed nor admitted by the prisoner, is clearly inadmissible.⁵ But if it be clearly proved that the prisoner made a statement before the magistrate which was not taken down in writing, it may be proved by any one who heard it.⁶

¹ 2 Phill. 103.

² *R. v. Shellard*, 9 C. & P. 277.

³ *Parsons v. Brown*, 3 C. & K. 295.

⁴ Sup. p. 177.

⁵ *Lambe's case*, 2 Lea. 625.

⁶ *R. v. Jacobs*, 1 Lea. 309.

A prisoner's statement is only evidence against himself, and not against others who are implicated in the same charge.¹ It has been decided that a statement will not be inadmissible because a magistrate has not given the prisoner the statutory caution that he has nothing to hope from any promise of favour, or to fear from any threat of punishment.²

DEPOSITIONS BEFORE CORONERS.

These are not within the 11 & 12 Vict. c. 42, but are practically admissible under similar restrictions. But it is said not to be necessary that they should be taken in the presence of the prisoner.³ But they must be signed by the coroner, and the handwriting must be proved.⁴

A coroner's inquisition is admissible between third parties to show that there has been such a judicial inquiry into the matters to which it refers.⁵ Such an inquisition will not be inadmissible in cases of murder or manslaughter, under 6 & 7 Vict. c. 83, as being written on paper and not on parchment.⁶

DEPOSITIONS UNDER COMMISSIONS.

When a witness is beyond the jurisdiction of the courts, or likely to be so at the time of trial; or when

¹ *R. v. Appleby*, 3 Stark. 33.

² *R. v. Sansome*, 12 L. J. 143, M. C.

³ Bull. N. P. 248; Wels. Cr. Pr. 210.

⁴ *R. v. England*, 2 Leach, 770.

⁵ *R. v. Gregory*, 15 L. J. 38, M. C.

• Ibid.

he is likely to be unable to attend the trial, owing to approaching dissolution, or permanent infirmity; the courts have power to grant a commission to examine such witness, either in Great Britain or abroad, at any time after the commencement of the action or suit;¹ and to permit his written deposition, as certified by the commissioner, to be read in evidence at the trial, on proof that the deponent is at that time beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial.

The foundation of this privilege is in the 13 Geo. 3, c. 63, s. 40, which permitted the prosecutor or defendant, in all indictments or informations for offences committed in India, to apply for and obtain a writ of *mandamus* to the superior judges in India, directing them to take, in due form of law, the statements of witnesses within their jurisdiction concerning the offence; and to return them in the form of signed and sealed depositions to the King's Bench. A similar privilege was given in actions and suits commenced in England: (s. 44.)

The 1 Will. 4, c. 22, taking this act as its basis, extended its provisions substantially "to all colonies, islands, plantations, and places under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of His Majesty's courts at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court, to the judges whereof the writ of commission may be directed, or elsewhere." By the 2nd section the colonial judges are empowered to enforce the attendance of witnesses in such cases in the same way as if the action or suit had arisen within their jurisdiction.

The 4th section empowers the courts at West-

¹ *Fynny v. Beasley*, 20 L. J. 395, Q. B.

minster, "and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction or otherwise; and by the same, or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters connected with such examination as may appear reasonable and just."

By section 5, witnesses within the jurisdiction may, by order of the court or of a judge, be summoned to attend the commission, and be attached for non-attendance. By section 7 the commissioner is authorized to administer an oath to the witness, or an affirmation in cases where the law permits it in substitution; and the witness is subjected to the penalties of perjury for giving evidence falsely: (see also 6 & 7 Vict. c. 83, s. 5.) And by s. 10 it is enacted:

"That no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant" (*query* examinee) "or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of signature to such certificate, be received and read in evidence, saving all just exceptions."

By 19 & 20 Vict. c. 123, the judges of the superior courts have power to order an examination on interrogatories or *viva voce* of persons whose evidence is required by a foreign court for the purpose of settling civil or commercial disputes pending before foreign tribunals. And by 22 Vict. c. 20, the same judges have power to order the examination similarly of witnesses within their jurisdiction, concerning suits and proceedings before any courts in her Majesty's foreign dominions.

Books of practice will be consulted as to the circumstances under which the court will grant a commission.¹ Generally, it may be observed that either plaintiff or defendant, after the commencement of the action, may apply for a commission ;² but the courts will not grant it as a matter of course, lest it should lead to parties going abroad to avoid cross-examination at trial ; and they will require the applicant to satisfy them, on affidavit, that it will conduce to the due administration of justice for the commission to issue. Accordingly, mere residence beyond the jurisdiction of the courts is insufficient, if it appear that the witness could attend at trial.³

The commission may issue to any one whom the court may appoint, even to the judges of a foreign court, if such judges are willing to act :⁴ and it will be no objection to the commission issuing, that it appears that they will examine the witnesses on principles which are not recognized by the English law of evidence ; but if it should appear at trial, either on the face of the depositions, or from extrinsic evidence, that inadmissible statements, hearsay for instance, have been received by the commissioners, the whole depositions will be rejected ; or, at all events, such

¹ See Chitty Stat. vol. 1, 1121, notes.

² *Brown v. Mollett*, 24 L. J. 213, C. P.

³ *Castelli v. Groome*, 21 L. J. 309, Q. B.

⁴ *Fischer v. Sztaray*, 31 L. T. 130.

portions as are inadmissible according to the English law.¹

The courts will not grant a commission to examine witnesses in a hostile country, although there be an open communication with it.²

The order must state the place to which the commission is directed, and the names of the commissioners, where the examination is within the jurisdiction of the court; but the last requisite is dispensed with, where the commission is directed to a foreign country.³ It should also state the mode in which the examinations are to be taken and returned.⁴ The examinations should also purport on the face of the depositions to have been taken on oath, where the witnesses can be sworn; but it appears to be only necessary to bring their evidence within the principles of *Omichund v. Barker*.⁵

The party to be prejudiced by the deposition must have had an opportunity of being present at the examination, and of cross-examining the witness.⁶ It appears, also, that he should have had formal notice that the commission was to be applied for or issued.⁷ But the opposite party may put in the depositions, as the witnesses are examined as much for one side as the other.⁸ The cross-interrogatories must also be read, as well as the interrogatories in chief, by the party who makes the latter his evidence.⁹

The depositions cannot be read if the deponent be in the country, and producible at the trial. Hence, when they are tendered on the ground of his being beyond the jurisdiction of the court, this fact must be

¹ *Lumley v. Gye*, 23 L. J. 112, Q. B.

² *Barrick v. Buba*, 25 L. T. 164.

³ *Grevillo v. Stulz*, 17 L. J. 14, Q. B.

⁴ *Atkins v. Palmer*, 4 B. & Ald. 377.

⁵ *Bolin v. Melliden*, 20 L. J. 172, C. P.; *supra*, p. 25.

⁶ *Attorney-General v. Davison*, M'Clel. & Y. 160.

⁷ *Steinkeller v. Newton*, 9 C. & P. 317.

⁸ *Proctor v. Lanison*, 7 C. & P. 629.

⁹ *Temperley v. Scott*, 5 C. & P. 341.

proved satisfactorily.¹ Thus, where it only appeared that the deponent was a sailor, and had belonged some months previously to a vessel lying in the Thames, but it did not further appear what had become of the man or the vessel, Lord Ellenborough thought the proof that the former was beyond the jurisdiction of the court too vague, although he was disposed to have admitted the deposition, if it had been shown that any efforts had been recently made to find the deponent.² But where a witness proved that he had seen the deponent start by railway to Gravesend, where the vessel lay in which he was to sail to Australia, and that he had received letters from the deponent, dated from two places on the English coast, where the vessel was known to have touched, it was held sufficient proof that the deponent was out of the jurisdiction of the court.³ But where it appeared in a similar case that the deponent was on board the night before the trial, and expecting to sail immediately, this was held insufficient.⁴

In like manner, when the deponent is dead or absent from sickness, the death or the nature of the malady must be distinctly shown. It has been doubted whether pregnancy, and generally whether temporary illness, will excuse non-attendance;⁵ but it is probable that, although the statute requires that the illness should be permanent, the cases on this head will be held as coming within the principles which regulate the admissibility of depositions in criminal cases.⁶

The provisions and machinery of the 1 & 2 Will. 4, c. 22, are, by the 17 & 18 Vict. c. 125, ss. 47 to 57, extended to cases in which a party to an action wishes to obtain, before trial, an inspection of documents which are in the hands of an opposite party. It is unnecessary to do more than refer to this act here.

¹ *Robinson v. Marks*, 2 M. & R. 375.

² *Falconer v. Hanson*, 1 Camp. 171.

³ *Varicas v. French*, 2 C. & K. 1008.

⁴ *Carruthers v. Graham*, 1 C. & M. 5.

⁵ *Abraham v. Norton*, 7 Moore & S. 384.

⁶ *Supra*, p. 301.

A judge has a discretionary power to receive parts of a deposition, and to reject other parts which either appear to have been elicited by leading questions, or to be otherwise objectionable.¹

Under the 14 & 15 Vict. c. 99, s. 2, it appears that the deposition of a party to an action will be admissible or inadmissible, as in the cases of ordinary witnesses.²

¹ *Small v. Nairne*, 13 Q. B. 840.

² *Solomon v. Howard*, 12 C. B. 463.

CHAPTER IV.

ON PUBLIC NON-JUDICIAL WRITINGS.

PUBLIC writings, which are not of a judicial character, are evidence of the matters which they purport to declare; provided they appear to have been obtained from proper custody, *i.e.*, from a place where it is reasonable to presume that they would be deposited, if authentic.

The question of proper custody under this head applies more exclusively to the case of such ancient documents as were considered incidentally in the ninth and tenth chapters of this work; and it will be sufficient to refer to those chapters for the principles which regulate the admissibility and effect of ancient charters, grants, terriers, inquisitions, or surveys. On the general question as to what constitutes a proper place of custody, see *supra*, p. 108.

The proof of public non-judicial documents is now chiefly regulated by the 14 & 15 Vict. c. 99, s. 14, which enacts that—

“Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by a copy; any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an

examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

On this section it has been decided that an unstamped copy of an act-book of the Ecclesiastical Court is evidence of probate to prove executorship.¹ So the journals of the House of Lords, entries in the books of tax collectors, commissioners of the excise or customs, secretaries of state, municipal or parliamentary electors,² which were provable before the act by examined copies, may now be proved, either by examined or certified copies under the act. So charters, letters patent, grants from the Crown, pardons, and commissions, may be proved either by originals, or examined or certified copies; or also, as it seems, by exemplifications under the great seal.³ As to the journals of the Houses of Parliament and royal proclamations, see *supra*, p. 282. As to proclamations, treaties, &c., of foreign states or colonies, *supra*, p. 286.

The 14 & 15 Vict. c. 99, s. 14, cited above, has virtually superseded the 8 & 9 Vict. c. 113, s. 1 (the Documentary Evidence Act), as far as it refers to public documents: but, as the two acts are construed cumulatively, and as the earlier act extends to some private documents, it is subjoined.

8 & 9 Vict. c. 113, s. 1.

"Whenever by any act now in force, or hereafter to be in force, any certificate, official or public docu-

¹ *Dorrett v. Meux*, 23 L. J. 221, C. P.

² 2 Phill. 231.

³ Tayl. 1814.

ment, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register, or other book, or of any other proceeding, shall be receivable in evidence in any judicial proceeding, the same shall respectively be admitted in evidence, provided they purport to be sealed or impressed with a stamp, or sealed or signed alone, as required, or impressed with a stamp and signed as directed by the acts made or hereafter to be made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof, in every case in which the *original record* would have been received in evidence."

It seems impossible, as remarked by Mr. Phillips (vol. 2, p. 241), to give any meaning to these last italicized words; and they appear, as stated by Mr. Taylor (vol. 1, p. 13), "to have been copied from the 1 & 2 Vict. c. 94, s. 13, by some honourable member who did not know distinctly what he was about." The professional reader will, however, read "record" as synonymous, for the occasion, with "document."

The effect of these enactments, as to documents of a public nature, is to allow the substitution of certified or examined copies in all cases in which the original, if produced, would be evidence.

Whenever, therefore, it is proposed to tender an examined or certified copy of a public document in the place of an original, the practical question is, whether the original is such a public document as is intrinsically evidence *per se*. Documents of a private nature will be subject to a different test. These will be considered subsequently.

The more important and practical description of public documents will now be considered. First:—

PARISH REGISTERS.

"Parish registers are in the nature of records, and

need not be produced, or proved by subscribing witnesses.”¹ They are therefore provable under the 14 & 15 Vict. c. 99, s. 14.

But it should appear that the original is in the proper custody, which, in the case of marriage, baptismal, and death registers, is with the incumbent, and not the parish clerk.² But the register, or the copy in such a case, is only proof of the fact of a marriage, or a birth, or a death, of a person or persons therein named; and it is no evidence of the identity of a party. This must be shown extrinsically, as in the case of a marriage, either by proving the handwriting of the parties, or by calling a witness who was present at the marriage;³ but the handwriting may be spoken to without producing the register.⁴

By the 52 Geo. 3, c. 146, verified copies of all registers of baptisms and burials are to be sent yearly by all ministers to the registrar of their diocese; and by the 6 & 7 Will. 4, c. 86, s. 38, “the Registrar-General shall cause to be sealed or stamped” with the seal of his office, “all certified copies of entries given in his said office: and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid.” The same act, s. 36, directs “every rector, vicar, or curate,” and every registered officer, to allow searches to be made in “any register book in his keeping,” and to give certified copies of entries for a stated fee. Similar provisions are established with regard to non-parochial registers, by the 3 & 4 Vict. c. 92, s. 9,

¹ Lord Mansfield, C. J. : *Birt v. Barlow*, Doug. 172.

² *Doe v. Fowler*, 19 L. J. 151, Q. B.

³ *Birt v. Barlow*, Doug. 272.

⁴ *Sayer v. Glossop*, 2 Exch. 409.

subject to regulations as to notice ; but in criminal cases the original register or record must be produced: (s. 17.) As to Irish marriages, see 7 & 8 Vict. c. 81, ss. 52, 71. Marriages before British consuls since 1848, 12 & 13 Vict. c. 68. Indian marriages, 14 & 15 Vict. c. 40, s. 22.

LETTERS PATENT,

Specifications, disclaimers, memoranda of alterations, and all documents filed with the Commissioners of Patent of Inventions, or in the Court of Chancery, may be proved by printed or manuscript copies, or by extracts certified and sealed by the commissioner or other proper officer: (16 & 17 Vict. c. 115, s. 4.) The fifth section renders copies of drawings, &c., similarly certified, evidence throughout the British dominions.

COPYRIGHT.

The 5 & 6 Vict. c. 45, s. 11, enacts that a register of "the proprietorship in the copyright of books, and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company," and be open to inspection of any person, on the payment of one shilling for every entry searched for. And the officer is empowered to give a certified copy under his hand, and impressed with the stamp of the company, of any such entry; which copy shall be received as evidence in all courts, and as *primâ facie* proof of the proprietorship or assignment of copyright or licence, as

therein expressed, but subject to be rebutted by other evidence; and, in cases of dramatic or musical pieces, shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid. A similar provision is found in the International Copyright Act, 7 & 8 Vict. c. 12, s. 8.

REGISTRATION OF DESIGNS.

Copies of any registration, entry, drawing, print or document, certified and sealed by the registrar, are evidence in all courts of the purport, contents, &c., of such entry, drawing, &c.: (13 & 14 Vict. c. 104, s. 14.)

POLL BOOKS.

Office copies, issued by the Clerk of the Crown, or his deputy, shall be taken as evidence in all courts of law, in actions for bribery or personation, or for any other purpose whatsoever: (6 & 7 Vict. c. 18, s. 94.)

SHIPPING REGISTERS.

Shipping registers, or declarations made in pursuance of the Shipping Act, with regard to the ownership, registry, &c., of British ships, may be proved *primâ facie*, either by original or examined copies, or copies certified by the registrar or other proper officer: (17 & 18 Vict. c. 104, s. 107.) By the 277th section of the act, all shipping masters and officers of customs

are to take charge of all documents, which they receive under the act, and transmit them, if required, to the Registrar-General of Seamen, who may either be required to produce the same, or may give certified copies, which are to have all the effect, in evidence, of originals. So, all entries in official log-books under the same act are admissible under the same act.¹

CORPORATIONS.

These are not strictly societies of a public nature, for the purposes of evidence ; but they will be conveniently considered here as being of a *quasi* public nature, and as connected with the principles of joint-stock company evidence.

Corporation books are evidence to prove entries of a public character, ² but not to prove transactions of the corporation with the public.³ They appear to be evidence in the nature of admissions between members of the corporation ; ⁴ but not of the rights and privileges of the corporation against strangers.⁵ Where such books are tendered as evidence under the 14 & 15 Vict. c. 99, s. 14, they must appear to be of such a public nature as the act intends, in order to admit of the substitution of examined or certified copies for the production of the original ; but, generally, they appear to be inadmissible unless rendered admissible by statute.

¹ S. 285.

² *Marriage v. Lawrence*, 3 B. & A. 144.

³ *Gibbon's case*, 17 How. St. Tr. 810.

⁴ *Hill v. Manchester Waterworks*, 2 B. & Ad 544.

⁵ *Lord Mayor of London v. Lynn*, 2 H. Bl. 214, n.

JOINT STOCK COMPANIES.

The proceedings, contracts, &c., of public companies in reference to the law of evidence, are subject to the provisions of several recent statutes, of which the principal is the 19 & 20 Vict. c. 47.

By the 26th section of this act, the register of shareholders is evidence of all matters directed or authorized by the act to be inserted therein.¹

By sect. 41, contracts on behalf of any company registered under this act are to be made under the seal of the company, and must be discharged similarly if the contract be such as, if made between private persons, would be required to be under seal.

If the contract be one which, between private persons, would be required to be in writing, it may be made, varied or discharged by writing signed by any person acting under the express or implied authority of the company.

If the contract be one which might be made by parol (*i.e.*, by word of mouth between private persons), it may be made, varied or discharged by parol, by any person acting under the express or implied authority of the company.

The certificate of incorporation is conclusive evidence that all the requisites of the act have been complied with : (sect. 13.)

The minutes of resolutions and proceedings at general meetings, if purporting to be signed by the chairman of such meetings, are *primâ facie* evidence of such resolutions and proceedings : (sect. 40.)

¹ Cf. *Baker v. Cave* 26 L. J. 190, Ex.

The same act contains other special provisions, which will be stated more fully in a later chapter.¹

When the corporation, or company, is not of such a public description, its documentary writings will be subject to the ordinary rules ; and will generally be inadmissible as hearsay, except to refresh the memory of a witness, or as entries against interest, or in the course of business. So, where a document is tendered, purporting to be sealed by the seal of the company, the genuineness of the seal must be proved by some one who knows it,² unless it be the seal of the Corporation of London, which proves itself ;³ or the seal of the Apothecaries' Company, which also proves itself under 14 & 15 Vict. c. 99, s. 8.

BYE-LAWS.

These are *quasi* public documents which are generally regulated by particular statutes or charters. They appear to be generally within the spirit of the Documentary Evidence Act, and the 14 & 15 Vict. c. 99. Their validity depends primarily, either on their conformity to the powers given by special acts, or to the provisions of the Joint Stock Companies Act, ss. 25 and 47, which empower companies, on complete registration, to make, from time to time, at general meetings, bye-laws for the regulation of the company, "not being repugnant to or inconsistent with the provisions

¹ See p. 371, *infra*.

² *Moises v. Thornton*, 8 T. R. 307.

³ *Doe v. Mason*, 1 Esp. 53.

of the act, or of the deed of settlement of the company ;” and by s. 48, “in all actions, suits, and other legal proceedings for the enforcement of such bye-laws, or other penalties for the breach thereof, the production of a written or printed copy, purporting to have the official seal of the Registrar of Joint Stock Companies affixed thereto, shall be sufficient evidence of such bye-laws.” A similar provision is contained in 8 & 9 Vict. c. 16.

A railway bye-law will not be binding on strangers, unless it have been approved by the Board of Trade or Commissioners of Railways, or other proper officer (3 & 4 Vict. c. 97, ss. 7, 10 ; s. v., 8 & 9 Vict. c. 20, ss. 108 to 111), nor generally, unless it be proved to have come actually or constructively to the notice of the party who is to be affected by it.¹ Where such bye-law is good, or where a statutory notice has been affixed under the Carriers Act, it will be sufficient, apparently, to prove that such a bye-law or notice was duly affixed, and then to prove an examined copy.²

It must be remembered that, notwithstanding the Documentary Evidence Act, and the 14 & 15 Vict. c. 88, s. 14, there are numerous cases in which the originals of documents, apparently of a public nature, must still be produced ; and of which neither certificates nor examined copies are admissible. A considerable degree of vagueness still attaches even to many of those cases in which certified or examined copies are clearly admissible ; and it should be remembered that, whenever a doubt exists as to whether a document is public or private, the prudent and the right course will be to be provided with the originals. It will also be remembered that the substitution of copies or certificates for original documents is a statutory innovation on the common law ; and that where

¹ *Great Western Railway v. Goodman*, 21 L. J. 197, C. P.

² Tayl. 1275.

a document is even as much of a public as of a private nature, it contains those objectionable elements of hearsay which are opposed to the fundamental principles of the law of evidence. In short, there is no department of evidence in which, notwithstanding the above acts, it is more difficult to pronounce distinctly on the degrees of admissibility; and it will still be a safe rule, as it is the sound principle, to produce the originals of even the most undoubtedly public documents, whenever they can be obtained without excessive difficulty or expense. Considerable doubt seems also to exist as to the kind of public documents which are within the acts. Thus, Mr. Taylor (p. 1230, 2nd edit.) is of opinion that neither under the 7 & 8 Vict. c. 110, s. 32, nor under the 8 & 9 Vict. c. 16, s. 98, by which the entries of the proceedings of companies are evidence, if purporting to be duly signed by the chairman, and sealed with the company's seal, can certified or examined copies be given in evidence, but the original entries must be produced. This position, however, appears to be very doubtful, and not to be supported by any decision. It seems also to be opposed to the spirit and the express language of the Documentary Evidence Act.

Where a public document or mark requires to be authenticated, it may be proved by any expert and credible witness. Thus the Post-Office mark may be proved by any post-master, or by any one who is in the habit of receiving letters by the post.¹

BILLS OF LADING.

By the 18 & 19 Vict. c. 111, ss. 1 and 2, every consignee of goods named in a bill of lading, and

¹ *Abbey v. Lill*, 5 Bing. 299.

every indorsee of a bill of lading, becomes the absolute owner, with all the personal rights and liabilities of ownership, subject to the consignor's right of stoppage in transitu, and claims for freight. By sect. 3 :

“Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board : provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom he claims.”

BILLS OF SALE

under the Merchant Shipping Act, 1854, s. 55, which are required to be attested, may be proved by any person who is able to bear witness to the requisite facts, without the attesting witness being called: s. 526.

FRIENDLY SOCIETIES.

All rules, &c., copies and extracts, purporting to be signed by the registrar, are admissible without proof of his signature.¹

¹ 18 & 19 Vict. c. 63, s. 30.

HISTORIES

are said to be admissible to prove a matter relating to the kingdom at large,¹ such as the death of a sovereign or the time of his accession ;² but not to prove a particular or local custom. Still less are peerages, army and navy lists, directories, calendars, or other non-official publications, admissible.³

¹ Bull. N. P. 248.

² 2 Phill. 155.

³ Sup. Chap. 8.

CHAPTER V.

ON PRIVATE WRITINGS, INSPECTION, AND
NOTICE TO PRODUCE.

THE question how far private writings are primary or admissible evidence was examined in the first chapter of the second part of this work. It will be remembered that, generally, personal *ex parte* statements are never evidence for the party making them ; although they are commonly evidence in the nature of an admission against him : (*supra*, Chapter XVI.) Thus, a voluntary affidavit, made before an officer of the superior courts, is not evidence at *Nisi Prius* or elsewhere, against a person referred to in it ; although such an affidavit will, in a similar case of privity, be evidence against the party who makes it.¹ So the affidavit of an absent creditor is inadmissible to oppose an insolvent's application for protection.²

But, when private writings contain a contract, or otherwise embody, or are material to the substance of the issue, they are not only admissible, but also, when producible, indispensable evidence. In such cases a party who relies upon them must either produce them, or account satisfactorily for their non-production. But as such writings are frequently in the hands of an adverse party, who will not voluntarily produce them,

¹ *Brickell v. Hulse*, 7 A. & E. 457 ; *s. v.*, *Morgan v. Couchman*, 23 L. J. 36, C. P.

² *Re Wright*, 25 L. T. 318.

the first practical question under this head is to consider how he may be compelled, either to produce them, or to permit an inspection, such as, in the event of non-production after notice to produce, will enable a party to give secondary evidence at trial.

At common law, when a deed or other private document formed the gist of a plea, the defendant was bound to set it out and tender profert ; on which the plaintiff claimed oyer, and so became entitled to a sufficient inspection. But it was found that this practice fostered prolixity of pleading ; and it was therefore abolished by the Common Law Procedure Act, 1852, s. 55.

The inspection of documents in the hands of an adverse party is now obtained and regulated by the 14 & 15 Vict. c. 99, s. 6 ; and the 17 & 18 Vict. c. 125, s. 50 : (Common Law Procedure Act, 1854.)

The first of these acts and sections is as follows :—

“ Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the County of Durham ; such court and each of the judges thereof may respectively, on application made for such purpose, by either of the litigants, compel the opposite party to allow the party making the application, to inspect all documents in the custody or under the control of such opposite party, relating to such action or other legal proceeding ; and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped ; in all cases in which, previous to the passing of this act, a discovery might have been obtained by filing a bill, or by any other proceeding, in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge.”

In order to support an application to inspect under this act, the applicant must show that the documents

sought to be inspected are in the possession, custody, or control of the other party, and are material to substantiate his own case ; the effect of the evidence to prove that case being a matter to be decided upon the trial, and forming no ground for determining whether the inspection should be allowed or not.¹ Under this act the courts cannot compel a discovery, but can only grant an inspection of documents shown to be in the custody or under the control of an opposite party.²

By the 17 & 18 Vict. c. 125, s. 50, it is enacted that :

“Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit of such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession, relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the court or judge may make such further order thereon, as shall be just.”

The cumulative effect of these enactments is, that when documents relating to a matter in dispute in an action in any one of the superior courts of common law are in the custody or under the control of an adverse party, the court, or a single judge, have a discretionary power (corresponding to that of courts

¹ *Riccard v. Inclosure Commissioners*, 24 L. J. 49, Q. B.

² *Galsworthy v. Norman*, 21 L. J. 70, Q. B. ; *Hunt v. Hewitt*, 21 L. J. 210, Ex.

of equity in bills of discovery) to compel him to suffer the other party to inspect and take copies of such documents ; and, where a party declares only his belief on affidavit that an adverse party has such documents, the latter may similarly be compelled to declare on affidavit whether he has them, or whether he knows anything, and how much, about them ; and, if he confess to having them, he may similarly be compelled to produce them for inspection.

The practice under both of these recent acts is still unsettled ; but the following principles appear to be recognised.

It appears, from the language of the first statute, and the cases which have been decided on it, that an inspection is to be granted by common law courts only in such cases as those in which courts of equity compel an inspection by means of a bill of discovery, or under the summary procedure constituted by the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, ss. 18, 20. Since the discretion of the common law judges is therefore intended by the Legislature to be guided, in cases of inspection, by strictly equitable principles, it is desirable that these sections should be considered by the common law practitioner.

The 15 & 16 Vict. c. 86, s. 18, enacts that—

“It shall be lawful for the court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by the original defendant upon oath of such of the documents in his possession or power relating to the matters in question in the suit as the court shall think fit ; and the court may deal with such documents, when produced, in such manner as shall appear just.

Section 20. “It shall be lawful for the court, upon the application of any defendant in any suit, whether

commenced by bill or by claim, but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production, by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit as the court shall think right; and the court may deal with such documents as shall appear just."

A party to an action at law had, before the statute, and still has, an equitable right, by way of bill of discovery, to inspect all documents relating to his own case alone, or to his own case conjointly with that of his adversary.¹ He has a right to a discovery of everything bearing on his own case, or which he has reason to expect will be set up against it; but at this point the distinction is finely drawn that he has no right to a discovery of documents which belong exclusively to his opponent's case, or which are immaterial to the issue.² The equity courts refuse to entertain a bill of discovery, where the evidence is sought to support a criminal charge, or where it would expose a party to a criminal prosecution or penalty.³

A common law judge will consider these and similar equitable principles before he will grant an order for inspection, and will hold the substantial question to be, whether the applicant would be entitled to it in a court of equity.⁴ An affidavit in support of the application must also show a reasonable probability that the applicant requires the documents to complete his own case; and it must allege, at least, a distinct belief that they are in the custody, or in some way under the control, of the adverse party.⁵ Such an

¹ Wigram on Discovery, §§ 127 to 147.

² Ibid. § 299.

³ Ibid. § 127.

⁴ *Adams v. Lloyd*, 27 L. J. 499, Ex.

⁵ *Hunt v. Hewitt*, 7 Exch. 243; and 21 L. J. 210, Exch.; *Bray v. Finch*, 26 L. J. 91, Ex.

averment also must state more than a mere general belief that the adverse party holds documents which are material to the applicant's case, and must describe them sufficiently to enable the court to judge of their materiality.¹ The application will be refused if it appear to be of a *fishing* nature, or if it appear to be a pretext for delay, or merely to discover the case of the adverse party.² In the last-cited case, to detain for a deed, the defendant pleaded lien as an attorney; and the plaintiff, on an affidavit that he had not retained the defendant, and that the costs were due from a third party, was allowed to inspect the entries in the defendant's books as to costs claimed. So, in an action for work done, the defendant, on an affidavit that the work was not done, and that, if done, the charge was exorbitant, was allowed to inspect the entries in the plaintiff's books relating to the work.³ So it is held that an affidavit must state more than a probable necessity that the applicant will require the documents.⁴ As to materiality of documents, see the subjoined cases.⁵ In ejectment, the documents must relate to the title.⁶

In libel, imputing dishonesty to the plaintiff while in the defendant's service, where the defendant justified, the plaintiff has been allowed to inspect the books of the defendant, so far as they were necessary to enable the plaintiff to disprove the charge in the plea.⁷

Where the application is to inspect documents which are partly material and partly immaterial to the applicant's case, inspection will be granted of such of the documents only as are material to the applicant's case.⁸

¹ *Thompson v. Robson*, 27 L. J. 367, Ex.

² *Scott v. Walker*, 2 E. & B. 560, per Lord Campbell.

³ *Hunt v. Hewitt*, *supra*.

⁴ *Pepper v. Hill*, 21 L. J. 81, C. P.

⁵ *Sneider v. Mangino*, 21 L. J. 121, Exch.; *Riccard v. Inclosure Commissioners, &c.*, 24 L. J. 49, Q. B.

⁶ *Doe v. Langford*, 21 L. J. 217, Q. B.

⁷ *Collins v. Yates*, 27 L. J. 150, Ex.

⁸ *Erle, J.*, 1 Bail Ct. Cas. 37.

Even before the late statutes, the courts exercised a certain power of granting an inspection where the document was clearly material to the cause; and therefore the Legislature, in giving the common law courts equitable powers of granting inspection, must be taken merely to have extended, and not to have created, the jurisdiction. But the statute may also be taken to be declaratory of the common law in this respect; and, henceforward, the latter will be regulated by the principles of the former. Thus, in actions on bills of exchange, promissory notes, policies and agreements of every description, inspection, which before the statute was nearly a matter of course, seems to be now entirely so. It is to be remarked, also, that the common law courts do not, apparently, follow the principles of the equity courts in refusing an inspection when it appears to be applied for with an ulterior reference to a criminal charge; but they grant it, notwithstanding a suggestion that the document is forged.¹

The county courts, under the Practice Regulations, Rule 65, have the following power of granting and enforcing inspection:—

“Where in any action the defendant is desirous of inspecting any deed, bond or other instrument under seal, or any written contract or other instrument, in which he has any interest, and which shall be in the possession, power or control of the plaintiff, the defendant may, within five days from the service of the summons to appear, give notice by prepaid post-letter or otherwise, that he desires to inspect such instrument at any place to be appointed by the plaintiff, and the plaintiff shall appoint a place accordingly; and if the plaintiff shall neglect or refuse to appoint such place, or to allow the defendant or his attorney to inspect it within three days after receiving such

¹ *Thomas v. Dunn*, 6 M. & G. 274; *Rogers v. Turner*, 21 L. J. 9, Exch.

notice, the judge may, in his discretion, on the day of hearing, adjourn the cause for the purpose of such inspection, and make such order as to costs as he shall think fit."

In the superior courts, where a party to an action claims an inspection or copy of a writing, he should make a demand on the opposite party, and, if he require a copy, he should tender the expenses. On refusal, a summons should be taken out to show cause, before a judge. The application must be made on the affidavit of the party to the suit; and it is not enough that it should be made by his attorney.¹ The judge's order may be reviewed by the court, but it is not usual to apply to the court in the first instance.²

The court will not compel a person, not a party to the suit, to produce a document for inspection,³ unless he has obtained it from a party to the suit, and holds it in the nature of a trust for such party.⁴ But where such person holds independently, and paramount to the title of the party, he will not be subject to an inspection.⁵ Before there can be any foundation for granting an inspection, an action must have been actually commenced, and the document must be one in which both parties are jointly interested.

An inspection will not be granted when it appears to be sought, not *bonâ fide* for the pending action, but to assist the applicant in an action against a third person.⁶

"Inspection of documents, in the custody of an adverse party, is only permitted when they are to some extent the property of both parties, as in the case of an agreement of which there is but one copy; then the

¹ *Herschfield v. Clark*, 25 L. J. 113, Ex.

² 2 Phill. 191.

³ *Cocks v. Nash*, 9 Bing. 721.

⁴ *Doe v. Roe*, 1 M. & W. 207.

⁵ *Ibid.*; cf. *R. v. Daventry*, 7 W. R. 445.

⁶ *Temperley v. Willett*, 25 L. J. 259, Q. B.

party who holds it, holds it as a trustee for the other.”¹
The costs of an inspection are not necessarily costs in the cause, but are in the discretion of the court.²

NOTICE TO PRODUCE.

According to the rule that the best evidence must be given, and that secondary evidence is inadmissible until the absence of primary evidence be explained satisfactorily, a party who relies upon a written document must either produce it, or show that he has made every reasonable effort to produce it. In the latter case, if he has been unsuccessful, he may prove the original document, either by a copy, or by any other authentic kind of secondary parol evidence.

It is a rule that all originals must be accounted for, before secondary evidence can be given of any one.³

This is the universal rule in the case of private, as distinguished from public, writings. Accordingly, if a party ascertain, either by inspection or otherwise, that an original document, necessary to his case, is in the hands of an adverse party, who will not voluntarily produce it, his first step will be, after obtaining an inspection and a copy, if necessary, to give his adversary notice to produce the original at the trial. If after proof that such notice has been given, and that the original is in the hands of the adverse party, the latter will not produce it, the party requiring it may resort to secondary evidence of it.

Before this can be used, the party tendering it must prove, or raise at least a reasonable presumption, that the original is in the hands of the adverse party, or of

¹ Tindal, C. J.: *Jessell v. Millenger*, 1 Moo. & S. 606.

² *Stillwell v. Ruck*, 7 W. R. 488.

³ Parke, B.: *Alivon v. Furnival*, 1 C. M. & R. 292.

a third person in privity with him.¹ Slight evidence of this fact will be sufficient, when the document either naturally, necessarily, or probably, might be expected to be in the custody, or under the control, of such adverse party. Thus, it has been presumed that a bankruptcy certificate came into the hands of a bankrupt who was proved to have solicited it, and to have been charged for it by his solicitor.² And generally, where documents have been traced into a party's possession, it lies upon him to show what has become of them, in order to be able to object, after notice to produce, to the substitution of secondary evidence.³

Similarly, when there is a privity of title between the adverse party and a third person who holds the original, the former is equally compellable to produce. The question in this case is, whether the custody was virtually, although not actually, the custody of the adverse party; or whether he had such a control over the holding by the third party as made it virtually a personal holding. Thus, generally, where the holding is by an agent, he may either be served with a *subpœna duces tecum*, or the principal may be served with notice to produce. Where a notice was given to an owner of a vessel to produce a document which appeared to be in the possession of the captain;⁴ where it was given to the drawer to produce a cheque which was proved to have been delivered to the drawer's banker;⁵ to a sheriff to produce a warrant which had been returned to the under-sheriff;⁶ secondary evidence has been received. But where the possession was independent of the adverse party, as where he had assigned a lease;⁷ or where the writing was held as a security by

¹ *Sharpe v. Lamb*, 11 A. & E. 805.

² *Henry v. Leigh*, 3 Camp. 502.

³ *R. v. Thistlewood*, 33 How. St. Tr. 757.

⁴ *Baldney v. Ritchie*, 1 Stark. 338.

⁵ *Partridge v. Coates*, Ry. & M. 156.

⁶ *Taplin v. Atty*, 3 Bing. 164.

⁷ *Knight v. Martin*, Gow. 103.

a third party;¹ or where it has been traced by a party satisfactorily into the possession of a stranger with whom he is unconnected, and over whom he has no control; he will not be affected by notice unless he have wilfully parted with the document after receiving the notice.²

A party may produce an original document at any time when secondary evidence is tendered; and then the latter becomes inadmissible. If there be any question as to the originality of the document, the judge must decide it.³

A notice to produce may be given to the adverse party, or his agent, either verbally or in writing.⁴ It must be proved to have been given in one of these ways, as soon as it appears that he is the holder of a required document, before secondary evidence of it can be received.⁵ It may be served either on the party or his attorney,⁶ and it will be sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter.⁷

The notice is not required to be in any precise or minutely-descriptive form, and the courts will not entertain frivolous or technical objections to its validity, if it point out, with general distinctness to the adverse party, the documents which he is required to produce.⁸ Notices to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action;"⁹ or "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all

¹ *Parry v. May*, 1 M. & R. 279.

² *Knight v. Martin*, sup.

³ *Boyle v. Wiseman*, 24 L. J. 284, Ex.

⁴ *Smith v. Young*, 1 Camp. 440; *Suter v. Burrell*, 27 L. J. 193, Ex.

⁵ *R. v. Stoke Golding*, 1 B. & A. 173.

⁶ *Hughes v. Budd*, 8 Dowl. 315.

⁷ *Evans v. Sweet*, Ry. & M. 84.

⁸ *Lawrence v. Clark*, 14 M. & W. 251.

⁹ *Jacob v. Lee*, 2 M. & Rob. 33.

books, papers, &c., relating to the subject-matter of this cause;"¹ or "all accounts relating to the matters in question in this cause;"² have been held sufficient notice to produce any document reasonably included in the description.

The notice ought to be within a reasonable time before the trial comes on; and it will be for the judge to determine, on the circumstances of the case, whether the notice has been served within a reasonable time previously to the trial.³

In town causes, and also in country causes, where the attorney lives in the assize town, if the documents be such as from the nature of the case may reasonably be presumed to be in his hands, notice may be served not later than early in the evening of the day preceding the trial;⁴ but if they are not such as are immediately connected with the cause, or are such as would presumably be in the hands of a client or other person, the notice must be proportionably earlier, according to an estimate of the time necessary to obtain them.⁵ In such a case, and especially in country causes, where the adverse attorney does not live in the assize town, the notice ought to be served on him before the commission day, and within a reasonable time before he is required to leave home for the assize town.⁶ But if he has the document with him at the assize town, service there will be sufficient.⁷

Where the adverse holder is abroad, or beyond the jurisdiction of the court, and leaves his attorney to conduct his cause, it will be presumed that he has also left with him all papers naturally connected with his case; and the courts, under such circumstances, are

¹ *Morris v. Hanser*, 2 M. & Rob. 392.

² *Rogers v. Custance*, 2 M. & Rob. 179.

³ Parke, B.: *Lloyd v. Mostyn*, 10 M. & W. 483.

⁴ *Atkyns v. Meredith*, 4 Dowl. 658.

⁵ *Byrne v. Harvey*, 2 M. & Rob. 89.

⁶ *George v. Thompson*, 4 Dowl. 656.

⁷ *R. v. Hawkins*, 2 C. & K. 823.

inclined to maintain the validity of a notice to the attorney.¹ But the circumstances must be such as to support a supposition that the papers were producible, and the notice sufficient. Thus, a three days' notice to produce letters written by a defendant to his partners in New South Wales, was held sufficient, on its appearing that there had been litigation between the same parties some years previously, for the purposes of which it was reasonable to suppose that the letters must have been remitted to England.²

If a party, on being served with notice to produce, state that the document does not exist, secondary evidence will be admissible, and the adverse party cannot object to the lateness of the notice.³

The Common Law Procedure Act, 1852, s. 119, enacts that:—

“An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served.”

Notice to produce is unnecessary—

1st. Where a party holds a duplicate original, or counterpart of his adversary's document.⁴

But such duplicate or counterpart must not be a mere copy, but in all respects of equal and co-extensive character and validity with the adversary's document. In such a case it is receivable as being itself primary evidence.

2nd. When the nature of the case and proceed-

¹ *Bryan v. Wagstaff*, Ry. & M. 47.

² *Sturge v. Buchanan*, 10 A. & E. 598.

³ *Foster v. Pointer*, 9 C. & P. 720.

⁴ *Colling v. Treweek*, 6 B. & C. 398.

ings inform the adverse party sufficiently, that he will be required to produce the document.

Thus in trover for a bond or other instrument,¹ or on an indictment for stealing a writing,² the plaintiff or prosecutor may give secondary evidence without proving notice to produce. But this rule is subject to several special limitations. Thus, in forgery, the prosecutor must give notice to the prisoner to produce the original ;³ in arson, for setting fire to a dwelling-house, with intent to defraud an insurance company, notice must be given to produce the policy.⁴ So, in civil cases, in an action on a cheque or a bill, if the defendant does not traverse the making or acceptance, but only avoids, the plaintiff need not produce without notice.⁵

3rd. A notice to produce a notice is not required,⁶ *e. g.* a notice to quit, a notice of action, notice of dishonour of a bill, notice to produce a signed attorney's bill in an action on it.⁷

The principle of this rule is that the service of the original notice is in itself a sufficient notice to produce it at the trial if required. It does not apply where the notice has been given to one who is not a party to the action, nor where it contains the terms of a contract ; as where a carrier, relying upon a notice served on the plaintiff to limit his liability, was held bound to give notice to produce it.⁸

¹ *Scott v. Jones*, 4 Taunt. 865.

² *R. v. Aickles*, 1 Lea. C. C. 294.

³ *R. v. Halworth*, 4 C. & P. 254.

⁴ *R. v. Ellicombe*, 5 C. & P. 522.

⁵ *Goodered v. Armorer*, 3 Q. B. 956.

⁶ *Philips v. Chase*, 2 Camp. 111.

⁷ *Colling v. Treweek*, 6 B. & C. 394.

⁸ *Jones v. Tarleton*, 9 M. & W. 675.

- 4th. If a party or his attorney be shown to have an original with him in court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce.¹

But it is doubtful whether he can be required in court to search among his papers to see if he has it with him.² As to the similar case of a non-subpœnaed witness refusing to produce a document in court, see below.³

- 5th. Notice will not be required when the adverse party has admitted the loss of the original; or where it is in the nature of an irremovable fixture, such as a mural inscription.⁴

But this rule does not apply to a removable and portable notice or writing.⁵

- 6th. Merchant seamen are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it.⁶

On notices to admit see *supra*, Chapter XVI., p. 168.

¹ *Dwyer v. Collins*, 21 L. J. 225, Ex.

² Tayl. 390.

³ *Phelps v. Drew*, 23 L. J. 140, Q. B.

⁴ *Bartholomew v. Stephens*, 8 C. & P. 728.

⁵ *Jones v. Tarleton*, 9 M. & W. 675.

⁶ 17 & 18 Vict. cap. 104, s. 165; *Bowman v. Manzelman*, 2 Camp. 315.

CHAPTER VI.

ON INTERROGATORIES.

As the inspection of documents in the hands of a hostile party has been considered in the preceding chapter, it is proposed in the present chapter to treat of the analogous and connected subject of evidence taken by means of interrogatories, under the jurisdiction of the superior courts of common law. This branch of evidence has been imported recently from the equity courts; and by means of it a party is enabled to acquire evidence, which may be necessary to enable him to prove his case in court, and which he can obtain only by extracting it from his adversary. As the statutory right of inspection enables a party to examine documents which are in the possession or under the control of his adversary, so the corresponding right of delivering written interrogatories to him enables the interrogating party to elicit much important evidence which would otherwise be concealed, at least until trial, in the breast of his adversary.

This privilege is given by the 51st section of the Common Law Procedure Act, 1854, which enacts that "in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may (with the declaration), and the defendant may (with the plea), or either of them, by leave of the court or a judge, may at any other time deliver to the opposite party, or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter), interrogatories in

writing upon any matter as to which discovery may be sought, and require such party (or, in the case of a body corporate, any of the officers of such body corporate) within ten days to answer the question in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting without just cause sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or judge shall allow, shall be deemed to have committed a contempt of court, and shall be liable to be proceeded against accordingly."

There has been some doubt among the judges whether the Legislature, in the above section, intended to limit the new privilege to those cases only in which a court of equity would entertain a bill of discovery; and eminent authorities have held that the statutory right of discovery in the common law courts is more extensive than that which exists in the equity courts.¹ But it seems to be settled now that the right of discovery at common law is measured by, and exactly co-extensive with, the right of discovery in a court of equity.² It is beyond the limits of this work to treat at length on the rules of equitable discovery; and a full development of this doctrine must be sought in such works as Wigram on Discovery. But it will be endeavoured to state and exemplify, in the present chapter, the equitable maxims which have been recognised already as the guiding principles of the common law courts.

Of these principles the fundamental one is, that only such interrogatories will be allowed as tend strictly to advance the case, which, according to the rules concerning the burden of proof, the interrogating party is bound to establish in court. The act is

¹ Parke, B. and Alderson, B.: *Osborne v. London Dock Company*, 24 L. J. 140, Ex.

² *Carew v. Davies*, 25 L. J. 165, Q. B.; *Horton v. Bolt*, 26 L. J. 267, Ex.; *Adams v. Lloyd*, 27 L. J. 499, Ex.

intended to remove the necessity of parties going to a court of equity to obtain evidence by a bill of discovery; and its provisions are applicable when either party has a specific case to establish, and some of the materials are in the possession or under the control of his adversary.¹ For this purpose, he is allowed to ask, and his adversary is bound to answer on oath, all questions which are strictly relevant and material to the proof of the interrogant's case. But the interrogant cannot require an answer to merely speculative questions; nor to questions of which the only object is to discover or weaken the case of his opponent. The latter branch of this rule has been stated by several learned judges, in the homely but expressive doctrine that the court will not allow either party to deliver *fishing* interrogatories²—i.e., interrogatories which, although the answers to them might be serviceable and important to the interrogator, are not necessary to enable him to present a reasonable *prima facie* case to the court, and are manifestly destructive to the case of the party interrogated.³ On the other hand, an interrogatory will not be disallowed merely because the answer to it would destroy the case of the interrogated party, provided that the subject-matter of the interrogatory can be construed as reasonably common to both parties.⁴ In *Osborne v. London Dock Company* (*sup.*), it seems to have been thought by the Court of Exchequer that interrogatories may be administered to the same extent as if the party interrogated were a witness under examination at the trial; but it would appear that this view was founded on that more extensive construction of the statute which the Court of Queen's Bench dissented from in *Carew v. Davies* (*sup.*) There Lord Campbell, C.J., after citing the last-mentioned view of the Court of Exchequer,

¹ *Moor v. Roberts*, 26 L. J. 246, C. P.

² *Zarifi v. Thornton*, 26 L. J. 215, Ex.

³ *Moor v. Roberts*, 26 L. J. 246, C. P.

⁴ *Whateley v. Crawford*, 25 L. J. 163, Q. B.

spoke of it as laying down the rule "rather widely ;" and his lordship added: "I think the true rule is, that such questions may be put as may reasonably be expected to produce answers tending to advance the case of the party who puts them. The rule on this subject has been very clearly laid down by that great jurist, Sir James Wigram; and I concur in that rule in the very terms he has laid it down. Whatever advances the plaintiff's case may be inquired into, though it may at the same time bring out matters which the defendant relies on for his defence; but you shall not inquire into that which is exclusively matter of defence. That which is common to both the plaintiff and the defendant may be inquired into by either." It seems, therefore, that the general principle stands as it has been laid down by Lord Campbell, and that, although community of interest in one subject-matter, equally applicable and necessary to the establishment of the cases of both parties, will enable both to interrogate, and be ground for compelling both to answer, yet such community and reciprocity must be manifest; and, where they are not so, and still more where it appears that the case of the interrogant is reasonably complete without the discovery sought, and that the purpose of the interrogatory apparently is merely to defeat by anticipation the case of the party interrogated—then and in all such cases the interrogatory will be disallowed. *Carew v. Davies*, and the contemporaneous case of *Whateley v. Crawford*,¹ affords a good illustration of this principle. In both cases the actions were for negligence; and the plaintiffs proposed to deliver interrogatories, which severally sought to elicit admissions from the defendants, which tended directly to prove the negligence of which the plaintiffs complained. It was argued for the defendants that the latter should not be compelled to answer, because the interrogatories sought directly to elicit

¹ 25 L. J. 163, Q. B.

facts on which the defence in each case rested. The court recognised this tendency of the interrogatories, but, notwithstanding, gave leave to the plaintiffs to deliver them, on the above-stated ground that the information sought was the common right of both parties, and that, as the plaintiffs were directly bound to prove the negligence of which they complained, the defendants were therefore bound to disclose all facts which would help the plaintiffs to prove that negligence. There was nothing in the information sought by the interrogatories which could be said to be exclusively matter of defence, and therefore nothing which was beyond the grasp of the plaintiffs under the statute. So, in another case,¹ the action was for money had and received, and non-delivery of goods, to which the defendant pleaded never indebted and delivery. The plaintiff applied subsequently for leave to deliver interrogatories to the defendant, and the former in his affidavit stated substantially that the latter had acted as broker in the transaction, and had been paid by the plaintiff for the goods in question, which, notwithstanding, had never been delivered to the plaintiff. The interrogatories were to ascertain in effect whether the defendant had acted in the pretended sale as an agent, or as a principal; and Parke, B., had refused leave to the plaintiff at chambers, because the learned judge thought that the object of the interrogatories was to discover some third person against whom the plaintiff might bring an action. The court, however, granted leave, because the plaintiff was bound, in proving his case, to show that the defendant was not authorised to act as a broker. The court assigned no reason for this judgment; but it proceeded manifestly on this ground, and the case is therefore an illustration of the general principle, that interrogatories must ask only for answers which are reasonably necessary to establish the interrogant's case. For the dictum of

¹ *Thol v. Leaske*, 24 L. J. 142, Ex.

Parke, B., in this case should be noted, that if the plaintiff had really sought to discover evidence to fix a third person, the interrogatories could not have been allowed, not because they were "fishing," but because the answers to them, although valuable to the plaintiff and harmless to the defendant, would have been wholly irrelevant to the issue between them, and merely an underhand way of attempting to prejudice persons who were not before the court. On the other hand, interrogatories will not be objectionable merely on the ground that the answers to them would incidentally expose a third person to an action, provided that the interrogatories are material to the applicant's case.¹ It is also to be noticed that *Thol v. Leaske* clearly agrees with *Whateley v. Crawford*, in the doctrine that a party may be compelled to answer interrogatories, however damaging to his own case, provided such answers are material to support the interrogator's case. In *Tetley v. Easton*,² in an action for infringing a patent, and in which the defendant admitted the infringement, the plaintiff was allowed to deliver interrogatories as to the occasions on which the defendant had infringed the patent, and the persons to whom or for whose benefit the defendants had sold the goods which they had illegally manufactured. Such information was clearly necessary to the plaintiff's case, as it enabled him to compute damages. So, in another patent case, the defendant was entitled to learn by interrogatories what were the portions of a machine, to which the plaintiff contended that his invention had been unlawfully applied; and it was held also in this case that the insufficiency of the defendant's answer to the plaintiff's interrogatories was no ground for the plaintiff refusing to answer the defendant's interrogatories.³ So, also, in another case for infringing a patent, the plaintiffs were allowed to

¹ *Tetley v. Easton*, 25 L. J. 293, C. P.

² *Supra*.

³ *Jones v. Lee*, 25 L. J. 241, Ex.

[EV.]

deliver interrogatories as to whether the defendants had in their possession books containing entries, and also plans of the manufacture, by the defendant, of the subject matter of the alleged infringement.¹

It is no ground for refusing leave to deliver interrogatories that an attorney of a party interrogated makes affidavit that the answers would tend to criminate his client ; but the latter must take the objection himself on oath exactly as he is allowed to take it when under examination in open court.² It seems that the witness is entitled to decide for himself whether the answer to the question will criminate him ;³ although, as stated already, this doctrine is still unsettled.⁴

In other cases of privilege, it seems to be now settled that the privilege is no ground for objecting to the delivery of the interrogatories, although after they are delivered the party may refuse to answer on the score of privilege. This doctrine appears to have the superior weight of authority, although, in a case soon after the passing of the statute, the Court of Exchequer refused to allow a plaintiff in ejectment to deliver interrogatories, partly on the defect of the affidavit, but partly also on the ground that the interrogatories tended to establish a forfeiture, and would, therefore, not have been allowed in equity.⁵ But the same court, in a later and similar case, allowed a defendant in ejectment to deliver a series of interrogatories which directly investigated the title under which the plaintiffs claimed, as well as their relationship to the person through whom they were supposed to hold. In this case Alderson, B., held that the interrogatories might be put, if confined to pedigree. But they seem by the rest of the court to have been allowed generally, although some of them do not appear to have been

¹ *Smith v. Great Western Railway*, 25 L. J. 279, Q. B.

² *Osborne v. London Dock Company*, 24 L. J. 140, Ex.

³ *Adams v. Lloyd*, 27 L. J. 499, Ex.; cf. *Scott v. Miller*, 7 W. R. 561.

⁴ Sup. p. 69.

⁵ *May v. Hawkins*, 24 L. J. 309, Ex.

questions of pedigree.¹ This doctrine has been since confirmed,² but the converse does not hold ; for a defendant cannot be compelled to answer similar interrogatories from the plaintiff.³

It is a delicate and important function for a draughtsman of interrogatories to stretch them to the widest admissible limit without diverging into irrelevant matter. If they be too wide they may be amended generally, either at chambers or in court ; and the judges are disposed to admit considerable laxity. But if interrogatories be manifestly too wide, the court will not pare them down to their proper scope, but will disallow them altogether.⁴ If, however, any question arise as to the principle on which interrogatories should be allowed, the court will define the principle, but will not settle the form of the interrogatories, nor the particular interrogatories to be allowed. All such matters must be settled at chambers.⁵

On an examination under the 51st section of the Common Law Procedure Act, 1854,⁶ a party may be asked whether he has documents in his possession, and if he decline to set forth copies or the contents, the proper course is to apply to a judge at chambers for an order to inspect under sect. 50 of the same act.⁷ If he deny the possession of the documents, the interrogant is bound by the denial, and is not entitled to an inspection, nor to a better answer to the interrogatory.⁸ The rule is the same if the answer aver that the documents do not furnish any evidence of the applicant's claim.⁹

Interrogatories which tend to contradict a writing

¹ *Flitcroft v. Fletcher*, 25 L. J. 94, Ex.

² *Chester v. Wortley*, 25 L. J. 117, C. P.; *Horton v. Bolt*, 27 L. J. 267, Ex.

³ *Horton v. Bolt*, sup.

⁴ *Robson v. Cooke*, 27 L. J. 151, Ex.

⁵ *Zarifi v. Thornton*, 26 L. J. 214, Ex.

⁶ Sup. p. 344.

⁷ *Scott v. Zygomalas*, 24 L. J. 129, Q. B. ; sup. p. 331.

⁸ *Adams v. Lloyd*, 27 L. J. 499, Ex.

⁹ Ibid.

will not be allowed ;¹ but if there be a *primâ facie* case that the writing is lost, a party may be interrogated as to its contents : but the answers cannot be made evidence at trial, unless the non-production of the original can be accounted for satisfactorily, so as to let in secondary evidence.²

As the new law of interrogatories is regulated by the 51st section of the Common Law Procedure Act, 1854, so the new practice is formed by the 52nd section of the same act. That section directs substantially that leave to deliver interrogatories shall be by application to the court or a judge, founded on an affidavit by the party proposing to interrogate, and his attorney or agent, or in the case of a body corporate, of their attorney or agent, stating that the deponent or deponents believes or believe that the party proposing to interrogate will derive material benefit in the cause from the discovery which he seeks ; that there is a good cause of action or defence upon the merits ; and if the application be made on the part of the defendants, that the discovery is not sought for the purpose of delay. It is also provided that where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances, by which the party is prevented from so joining therein, allow the interrogatories to be delivered without affidavit. The affidavit must state that the party making it has a good cause of action, if a plaintiff, or a good defence, if a defendant, upon the merits ; and where a plaintiff's affidavit contained no such statement, but merely that he would derive material benefit from the discovery sought, and that there was a good cause of action, the affidavit was held to be insufficient ;³ and it is stated generally that the courts will refuse leave to administer interrogatories when the

¹ *Moor v. Roberts*, 26 L. J. 246, C. P.

² *Wolverhampton Company v. Hawksford*, 7 W. R. 244.

³ *May v. Hawkins*, 24 L. J. 309, Ex.

cause of action is doubtful, or where the facts in support of the application are uncertain.¹

A defendant cannot deliver interrogatories before plea, unless he establish a case of urgency ;² but a plaintiff may deliver them after plea without a special affidavit.³ The proper time for a plaintiff to deliver his interrogatories is with the declaration, and for the defendant with his plea.⁴ It is also to be noticed that the courts will order a foreigner, resident abroad, to answer interrogatories,⁵ but will not attach him for contempt, unless in a very clear case.⁶

The costs of interrogatories are not necessarily costs in the cause, but are in the discretion of the judge, by whom leave is given to deliver the interrogatories ; and where such an order is silent as to costs, they will not be allowed as costs in the cause.⁷ It follows, that in considering the expediency of delivering interrogatories, it will always be a grave question, not merely whether they are such as a judge will allow, but also such as he will allow to carry costs.

When a party omits to answer interrogatories, or to answer sufficiently, he may in the first case either be attached for contempt,⁸ or in both cases the interrogating party may apply to the court or a judge, for an order for the oral examination of the interrogated party before a master or a judge ; and the court may order parties to attend for examination, and to produce documents, and may impose such terms as to the examination, or the costs of it, as they may think proper.⁹ The court will exercise great caution and regard to special circumstances in entertaining an ap-

¹ *Atter v. Willison*, 7 W. R. 265.

² *Martin v. Hemming*, 24 L. J. 3 Ex.

³ *Jones v. Barnes*, 25 L. J. 182, C. P.

⁴ *Martin v. Hemming*, sup.

⁵ *Pohl v. Young*, 25 L. J. 232, Q. B.

⁶ *Von Hoff v. Hoester*, 27 L. J. 299, Ex.

⁷ *Smith v. Great Western Railway*, 25 L. J. 279, Q. B.

⁸ *Turk v. Syne*, 27 L. J. 54, Ex.

⁹ Common Law Procedure Act, 1854, s. 53.

plication for an oral examination, and will not grant it where the law is doubtful, or where there is no affidavit in support of the application.¹

Under the Common Law Procedure Act, 1854, the courts are empowered, on the hearing of any motion or summons, to order documents to be produced, and witnesses to be examined *viva voce* before the court or a judge or a master, and on hearing such evidence, or reading the master's report, may make such rule or order as may be just.² A similar provision is found in the Railway and Canal Traffic Act, 1854.³

¹ *Swift v. Num*, 27 L. J. 365, Ex.

² S. 46-47.

³ 17 & 18 Vict. c. 31, s. 3.

CHAPTER VII.

ON SECONDARY EVIDENCE—PROOF OF HANDWRITING—
ATTESTING WITNESSES — WRITINGS THAT REFRESH
THE MEMORY.

WHEN a party has done everything in his power to bring before the court primary evidence of his case, as by searching for documents in places where it was most reasonable to expect them to be deposited, or by giving an opposite party notice to produce them, he will then, and not till then, if he be unsuccessful in his exertions, be permitted by the court to give secondary evidence of such documents.

There are no degrees in secondary evidence ; and, therefore, when the absence of primary evidence is explained satisfactorily, any species of admissible secondary evidence may be substituted for the original. Thus, a lost deed may be proved, either by an attested copy or an examined copy, or by oral evidence of any one who can swear positively to the contents of the original. Accordingly, where it appeared that a party held a copy of an original, which was not produced, it was held that he was not obliged to produce the copy, but might give oral evidence of the original.¹ “As soon as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. The rule is, that no evidence is to be adduced which *ex naturâ rei* supposes still greater

¹ *Brown v. Woodman*, 6 C. & P. 206.

evidence behind in the party's own power and possession ;" ¹ and, therefore, it was held in *Doe dem. Gilbert v. Ross*, that oral evidence of an original might be substituted for an attested copy, which was tendered but rejected for want of a stamp. It is not, however, to be supposed that oral evidence of a document, although equally admissible with an attested or examined copy, is therefore entitled to the same credibility ; and it will be for a jury to place their own estimate on the value of the witness's memory. ²

Although either a copy or oral proof of an original will be equally admissible as secondary evidence, the copy of a copy, although compared with it, will be inadmissible, notwithstanding that the first copy is also proved to have been compared carefully with the original. ³

It will be presumed, in the absence of contrary evidence, that the original was properly stamped, if it required to be stamped, ⁴ and an unstamped copy will be good secondary evidence ; but if the original would have been inadmissible for want of a stamp, secondary evidence of it cannot be received. ⁵

When a copy is tendered as secondary evidence, it must be proved to be accurate by a witness who made it, or who actually read it and compared it with the original. ⁶

All originals must be accounted for before secondary evidence can be given of any one. ⁷

If a witness attend on a *subpœna duces tecum*, with a document which he refuses to produce on the ground of privilege, secondary evidence will be admissible. But if he do not attend on such a subpœna, or attend and refuse to produce the writing on any other ground

¹ Parke, B.: *Doe dem. Gilbert v. Ross*, 7 M. & W. 102.

² Tayl. 438.

³ *Liebman v. Pooley*, 1 Stark. 167.

⁴ *Crisp v. Anderson*, 1 Stark. 35.

⁵ *Crowther v. Solomons*, 6 C. B. 658.

⁶ *Fisher v. Samuda*, 1 Camp. 193.

⁷ Parke, B.: *Alevon v. Furnival*, 1 C. M. & R. 292.

but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt.¹

ON THE PROOF OF HANDWRITING.

The proof of signatures, or handwriting, is the essential part of the proof of private writings. There are various admissible kinds of such proof.

1. Handwriting may be proved by a witness who actually saw the party write or sign. This is the most satisfactory evidence.

2. By a witness who has seen the party write on other occasions, even if it be but once only.

3. By a witness who has seen documents, purporting to be written by the same party, and which, by subsequent communications with such party, he has reason to believe the authentic writings of such party.

4. Under the Common Law Procedure Act, 1854, s. 27, in civil cases, a witness may give his opinion as to the authenticity of a disputed document, by comparing the handwriting with any document which has been proved to the satisfaction of the judge to be the genuine writing of the party.

The practical principles of this department of evidence are well illustrated in the subjoined judgment of Patteson, J., in *Doe dem. Mudd v. Suckermore*.²

“All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous

¹ *R v. Llanfaethly*, 23 L. J. 33, M. C.

² 5 A. & E. 730.

knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write ; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname ; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate ; or by any other mode of communication between the party and the witnesses, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party ; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others ; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may say so, unintentionally, without reference to any particular object, person, or document."

On these common law principles, the Common Law Procedure Act, 1854, has engrafted the principle numbered 4, *suprà*. The 27th section enacts that—

" Comparison of a disputed writing with any

writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses ; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Before any writing is admissible under this section as a standard of comparison, its genuineness must be proved.¹

The 103rd section provides that the act "shall apply and extend to every court of *civil* judicature in England and Ireland." The act, therefore, does not extend to criminal proceedings; and in them, therefore, it appears that the practice continues as it existed in civil as well as criminal proceedings before the act; and that comparison of disputed handwriting with an admitted genuine document will be allowable only when the latter comes before the jury in the course of the case.²

ON PROOF BY ATTESTING WITNESSES.

It was a common law principle, that where a private writing was subscribed by one or more attesting witnesses, such attesting witnesses, or some one of such attesting witnesses, must be called to prove the execution of the instrument; and it was not competent to a party to prove it, even by the admission of the party by whom it was executed.

But by the 17 & 18 Vict. c. 125, s. 26 (Common Law Procedure Act, 1854), it is enacted that "it shall not be necessary to prove, by the attesting witness, any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

¹ *Hughes v. Lady Dinorben*, 32 L. T. 271.

² *Tayl.* 1433.

The 103rd section of the act confines the act, and therefore this principle, to courts of civil judicature in England or Ireland.

In determining, therefore, in a civil case, whether it will be necessary under this act to call the attesting witness to an instrument, the practical and simple question is, whether the instrument is one which requires attestation to give it validity. If the instrument would be void without attestation, the subscribing witness must still be called ; but, if attestation be unnecessary, the witness need not be called. Thus, in numerous statutory instruments, attestation is essential to their validity : *e.g.*, wills, warrants of attorney, cognovits, agreements, and indentures of apprenticeship under the Merchant Shipping Act, 1854, instruments executed in pursuance of powers, &c. On the other hand, ordinary bonds, deeds, and agreements of every kind, which are equally binding whether attested or not, are clearly provable without the production necessarily of a subscribing witness.

There are also several common law exceptions to the reservation contained in the act. Thus it is a rule that an attesting witness need not be called to prove an instrument which is more than thirty years old ; or when the original is withheld by an adverse party, who refuses to produce it after notice ;¹ or when the adverse party, in producing it after notice, claims an interest under it ;² or when the adverse party has recognized the authenticity of the instrument by acts in the nature of an estoppel in a judicial proceeding ;³ or when the attesting witness is proved to be dead, insane, beyond the jurisdiction of the court, or otherwise not producible after due endeavours to bring him before the court.⁴

In such cases it will generally be sufficient to prove

¹ *Poole v. Warren*, 8 A. & E. 588.

² *Tayl.* 1412.

³ *Ibid.* 1414.

⁴ *Ibid.* 1415.

the handwriting of the attesting witness. It is also held, that where an instrument requires to be attested by several witnesses, it may be proved by calling any one of them ;¹ except in the case of wills, which can be proved in courts of equity only by the production of all the producible witnesses.²

An instrument, which is required to be attested by several witnesses, may be proved by evidence of the handwriting of one of such witnesses, coupled with proof of his identity, as soon as the absence of all the witnesses has been explained satisfactorily, but not otherwise.³

Where a witness, called to prove the execution of an instrument, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution of the instrument, though the witness adds that he has no recollection. of the fact of the execution of the instrument.⁴

ON WRITINGS WHICH REFRESH THE MEMORY.

A document which may be inadmissible intrinsically and *per se* as primary or secondary evidence, either because it does not embody the substance of the issue, or because it is in the nature of hearsay, will often be admissible to refresh the memory of a witness, and to enable him to speak to the matters to which it refers.

It appears that such a document may be handed to a witness for inspection, and that the witness may give oral evidence accordingly, after a perusal of its contents:

¹ *Holdfast v. Dowring*, 2 Str. 1254.

² *M'Gregor v. Topham*, 3 H. of L. Cas. 155.

³ *Nelson v. Whittall*, 1 B. & Ald. 19.

⁴ Bayley, J. : *Maugham v. Hubbard*, 8 B. & C. 16.

- 1st. When the writing actually revives in his mind a recollection of the facts to which it refers.
- 2nd. When, although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain an accurate statement of such facts.
- 3rd. When, although the writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made unless the facts which it purports to describe had occurred accordingly.¹

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers to have recognized as a correct narrative when the facts were fresh in his memory.²

In this way a writing, which is inadmissible for want of a stamp, may practically be made evidence, as a memorandum to prompt the oral statement of a witness. But this case can only arise where the writing is not in itself primary or best evidence, and where a party has his option of resorting either to written or oral evidence. Thus, a writing which is void as an agreement may be equally serviceable as a memorandum. Thus, a memorandum of the receipt of money, which was void as a receipt for want of a stamp, has been held strictly admissible to refresh the memory of a witness, and to enable him to say, from the fact of his signature, that he had received money which he had no recollection of having received.³ Lord Tenterden,

¹ Cf. sup. p. 45.

² *Duchess of Kingston's Case*, 20 How. St. Tr. 619.

³ *Maugham v. Hubbard*, 8 B. & C. 482.

C.J., said: "In order to make the paper itself evidence of the receipt of the money, it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and, when he said that he had no doubt he had received the money, there was sufficient parol evidence to prove the payment."

According to the third principle, *suprà*, a person who is shown his name on a writing may depose to the genuineness of the document, although he has no recollection of it, or of affixing his name to it.¹

Generally, the memorandum, from which a witness speaks, need not be produced in court; but, if produced, the opposite party will be entitled to see it, and to cross-examine from it.² But where the witness derives his knowledge of a fact solely from his reliance on the accuracy of the memorandum, it must be produced.³

There is no precise time within which a writing must be shown to have been made, before it can be used by a witness. It is not necessary that it should have been made contemporaneously with the occurrence of the fact; but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper.⁴

It appears to be only necessary that the witness should swear positively that the memorandum was

¹ *R. v. St. Martin's, Leicester*, 2 A. & E. 210.

² *R. v. Hardy*, 24 St. Tr. 824.

³ *Doe dem. Church v. Perkins*, 3 T. R. 754.

⁴ 2 Phill. 484.

made at a time when he had a distinct recollection of the facts, and *ante litem motam*.¹

The memorandum must either have been made by the witness, or recognized by him at or about the time when it was made, as a correct account. It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appear to be the statement of a third person; as where it had been drawn up by such a person from the witness's own memoranda; or even if it be a copy made by the witness himself from his own original memoranda.² This rule is consistent with the general principles of secondary evidence, by which the copy of a copy, unless in the nature of a duplicate original, is entirely inadmissible;³ and there appears to be neither principle nor authority to support the personally eminent opinion of Mr. Phillipps, that the copy of an original memorandum, made by the witness himself from his own original, would be admissible.⁴ It must be remembered, that the original memorandum is itself not primary, but secondary evidence; that it is itself not an original, but a transcript and copy of the witness's own contemporaneous knowledge, which in its oral form would be the strictly primary and original evidence. Therefore, if the copy of a memorandum were admissible to refresh a witness's memory, there would be no reason why the examined copy of an examined copy of an original document should be, as it clearly is, inadmissible. Mr. Phillipps puts a case of a witness making a memorandum, then a copy of such memorandum, and then destroying the original; and supposes that in such a case the witness might refresh his memory from the copy. But, independently of an objection that the witness would be taking advantage of his own wrong or carelessness, it is clear that such a writing would be open to all the objections which

¹ *Wood v. Cowper*, 1 C. & K. 646; Tayl. 1092.

² *Jones v. Stroud*, 2 C. & P. 196.

³ Sup. p. 356.

⁴ 2 Phill. 486.

attach generally to the copies of a copy. This view corresponds with the express dictum of Patteson, J., in *Burton v. Plummer*,¹ that "the copy of an entry, not made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory." The cases where such a privilege appears to have been conceded, as where the author of a written report,² or an article in a newspaper,³ has been allowed to refer to the printed versions, are cases where such printed versions appear to have been treated as originals, and not as copies.⁴

An adverse party will have a right to cross-examine as to the particular entries on which the witness relies; but if he examines as to collateral or other entries, he makes them his evidence.⁵ A party, by producing a memorandum to refresh a witness's memory, makes it evidence for his adversary, but not for himself.⁶

¹ 2 A. & E. 343.

² *Horne v. Mackenzie*, 6 Cl. & Fin. 628.

³ *Topham v. M'Gregor*, 1 C. & K. 320.

⁴ Cf. *Tayl.* 1093.

⁵ 6 C. & P. 281.

⁶ *Payne v. Ibbotson*, 27 L. J. 41, Ex.

CHAPTER VIII.

ON MATTERS WHICH ARE REQUIRED TO BE PROVED
BY WRITING—THE STATUTES OF FRAUDS—OF LIMITATIONS—OF PRESCRIPTION.

MANY matters can be proved only by deed or other writing ; and, in such cases, oral evidence, however distinct and direct, is wholly inadmissible.

INCORPOREAL RIGHTS,

Such as advowsons, rents, remainders, reversions, *profits à prendre*, and easements, can be created or assigned only by deed, and must therefore be proved by deed.¹ Thus, a ticket of free admission to a theatre or a race course is insufficient evidence of a title to enter, unless it be by deed.²

CONTRACTS BY CORPORATIONS.

Contracts and acts done by corporations must generally be by deed, and can therefore be proved only by a deed bearing the corporation seal.³

This rule is an ancient principle of common law,

¹ Tayl. 782.

² *Wood v. Leadbitter*, 13 M. & W. 842.

³ *Arnold v. Mayor of Poole*, 4 M. & G. 860.

and still remains abstractedly unmodified; but, practically, a large class of exceptions has been engrafted on it, and their accumulative result appears to be that minor contracts, and other matters which are essentially incidental and necessary to the daily working of a corporation, may be proved by the ordinary principles of parol evidence. Thus it has been said by Rolfe, B.: "A corporation, it is said, which has a head, may give a personal command and do small acts; as, it may retain a servant; it may authorize another to drive away cattle, damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems from the earliest times to have been considered as delegated by the rest of the members to act for them."¹

His lordship referred also to the judgment of Lord Denman, in *Church v. Imperial Gas Light Company*, and spoke of the test as being a paramount convenience so great as almost to amount to a necessity.

The contract or matter must be evidently within the circle of a corporation's incidental necessities and daily emergencies, in order to be provable without a writing under the corporation seal: and such a writing will be indispensable to prove any contract or other transaction, by or with the corporation, where the matter is not within the routine of its daily business; or when it is of such an importance as not to support a reasonable presumption that authority to make such a contract, &c., has been virtually delegated to the agents of the corporation. The practical question in such cases is, was the transaction incidental or foreign to the purposes and daily business of the corporation?

¹ *Mayor of Ludlow v. Charlton*, 6 M. & W. 821.

If it be incidental, as to repair the premises of the corporation,¹ or a contract to buy or sell such goods as the corporation is formed to buy and sell;² such a matter does not require to be proved by the corporation seal. But when the goods to be supplied are not such as those in which the corporation usually deals;³ or when the contract is of such a magnitude, and of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by writing under the corporation seal.⁴ It is also to be remarked, that a long current of recent cases has tended to restrict the general principle that corporations can only contract under seal. The courts are unwilling to hold such contracts void, merely because they are not evidenced by the corporation seal; and are becoming every year more and more inclined to hold corporations bound by the contracts and acts of authorized or duly-appointed agents. Thus, it is said by a pre-eminent authority, that, "although corporations can only contract under seal, they are bound by their conduct, and by the acts of their solicitors, after their contract, just as an individual would be."⁵ So, in torts, corporations are liable for the acts of their servants, although they have not been appointed under the corporation seal;⁶ and use and occupation may be maintained by a corporation against a tenant who has entered, but who has not been constituted by a demise under seal.⁷

It is doubtful how far a corporation is bound by an executed contract, not under seal, but of which the corporation has received the benefit. The Court of

¹ *Saunders v. St. Neots Union*, 8 Q. B. 810.

² *Church v. Imperial Gaslight and Coke Company*, 6 A. & E. 846.

³ *Copper Miners Company v. Fox*, 16 Q. B. 229.

⁴ *Homersham v. Wolverhampton Railway Company*, 6 Exch. 137.

⁵ Lord St. Leonards: *Eastern Counties Railway Company v. Hawkes*, 25 L. T. 318.

⁶ *Eastern Counties Railway Company v. Brown*, 6 Exch. 314.

⁷ *Mayor of Stafford v. Till*, 4 Bing. 77.

Queen's Bench holds that the corporation is bound;¹ the Court of Exchequer² and the Common Pleas³ hold, apparently, that it is not bound.

CONTRACTS BY COMPANIES

Under the Companies Clauses Consolidation Act⁴ are provable under the following section :

Sect. 97. "The power which may be granted to any committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows; that is to say—

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same :

"With respect to any contract which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith; such committee or the directors may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same :

"With respect to any contract, which if made between private persons would by law be valid,

¹ *Saunders v. St. Neots Union*, 8 Q. B. 810.

² *Lamprey v. Billericay Union*, 3 Exch. 307.

³ *Arnold v. Mayor of Poole*, 4 M. & G. 860.

⁴ 8 & 9 Vict. c. 16.

although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary or discharge the same :

“ And all contracts, made according to the provisions herein contained, shall be effectual in law and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

“ And on any default in the execution of any such contract, either by the company, or any other party thereto, such action or suit may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only.”

On this section it has been held, that where a company has had the benefit of a contract made by an agent, there will be evidence for a jury of such a contract.¹

By the 98th section, the directors are to cause minutes to be made of all contracts entered into by them, which minutes are to be signed by the chairman of the meeting, and in this form they are to be *primâ facie* evidence that the meeting has been duly convened, and that the persons attending were directors, &c., as the entry describes them.²

The above act applies to contracts made by companies which are incorporated by special acts, and placed under its provisions, and therefore does not apply to contracts made by ordinary joint-stock companies after complete registration. These are regulated by several acts, of which the principal is—

¹ *Pauling v. London and North-Western Railway*, 8 Exch. 867.

² Cf. ss. 1, 21–28, 98.

19 & 20 Vict. c. 47.

Under this act, by

Sect. 40, "The company shall cause minutes of all resolutions and proceedings of general meetings of the company to be duly entered in books to be from time to time provided for the purpose, and any such minute as aforesaid, if signed by any person purporting to be the chairman of such meeting, shall be receivable in evidence in all legal proceedings, and until the contrary is proved, every general meeting in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened."

41. "Contracts on behalf of any company registered under this act may be made as follows (that is to say):

"1. Any contract which if made between private persons would be by law required to be in writing, and if made according to the English law, to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged :

"2. Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract in the same manner may be varied or discharged :

"3. Any contract which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged :

“And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and other parties thereto, their heirs, executors, or administrators, as the case may be.”

42. “Any company registered under this act may, by instrument or writing under their common seal, empower any person, either generally, or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company to the same extent as if it were under the common seal of the company.”

43. “A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company registered under this act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company.”

21. “A certificate under the common seal of the company, specifying any share or shares held by any shareholder, shall be *primâ facie* evidence of the title of the shareholder to the share or shares therein specified.”

26. “The register of shareholders shall be evidence of any matters by this act directed or authorised to be inserted therein.”

52. “A copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible as evidence in any legal proceeding.”

TRANSFERENCE OF SHARES.

The 8 & 9 Vict. c. 16, s. 14 (Companies Clauses, &c., Act) enacts that every transfer of shares under this act "shall be by deed duly stamped, in which the consideration shall be truly stated;" and a form of transfer is given in the schedule B. to the act. Before the transferee can be held liable for calls, his name must appear to have been placed in the sealed register of the company.¹

SALE OF SHIPS.

The 17 & 18 Vict. c. 104, s. 55, enacts that:—

"A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form E. marked in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferer in the presence of and be attested by one or more witnesses."

It appears that this provision extends to all vessels not propelled by oars.²

The preceding cases are the more important practical instances in which recent legislation has interfered to substitute exclusively written evidence, generally under seal, for merely oral evidence. But the basis of

¹ Sect. 15; *Mewry v. Inniskillen Railway Company*, 2 Exch. 118.

² Tayl. 794.

that department of English law which requires written evidence, and excludes oral evidence in numerous cases, is found in the

STATUTE OF FRAUDS.

(29 CAR. 2, c. 3.)

The chief object of this statute was to lessen the temptations to perjury which exist when a person is permitted to give oral evidence of an agreement in dispute between himself and another person; it therefore designates a number of cases in which none but written evidence of such a disputed agreement shall be received. Such agreements, when not proved by writings which embody their terms, and unless rendered void by the statute, still exist in contemplation of law, but are yet, virtually, null and non-existent, because they cannot be substantiated and established by the only species of evidence, viz., written evidence, which the Legislature has declared to be admissible proof of their existence. The contract may still be good, and the relative legal rights of the parties may be constituted abstractedly by word of mouth; but the statutory inadmissibility of oral evidence to prove the contract leaves the legal right unsupported by a legal remedy.

There is no branch of practical evidence of more constant and immediate importance than that which treats of contracts which fall within this statute, and which, therefore, can generally be proved only by written evidence. The cases are endless on the subject; but the limits of this work permit only a careful selection of such as bear prominently on the principal provisions of the act.

LEASES: OR INTERESTS IN LAND.

Sect. 1. "All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding."

Sect. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised."

Sect. 3. "No leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act or operation of law."

All these interests in land, if created or assigned since October 1, 1845, are now required to be evidenced by deed, according to the

8 & 9 VICT. c. 106, s. 3,

Which enacts that:—

"A feoffment, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless

evidenced by deed, and that a partition and an exchange of any tenements or hereditaments not being copyhold, and a lease required by law to be in writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law unless made by deed."

Under this sect. a lease, void as an agreement, will regulate the terms of tenancy.¹

It will be observed that these accumulative enactments not only abolish the remedy on an oral contract, purporting to create or transfer an interest in land, but also avoid the contract itself, unless it be evidenced by deed between the parties. It will also be observed that the 8 & 9 Vict. c. 106, s. 3, applies only to such interests in land as are comprised within the three first sections of the Statute of Frauds, and where the contract purports to divest one person of title, and vest it in another. Accordingly, it does not extend to written contracts for the sale of lands, or an interest in realty; but such agreements, although insufficient evidence of title, are still evidence where there has been a part performance,² on which specific performance may be granted, or by which damages on a breach may be proved and recovered. But for either of these purposes the contract must still be in writing, although it need not be by deed: according to part of the 4th section of the Statute of Frauds, which enacts that—

"No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the person

¹ *Tress v. Savage*, 23 L. J. 339, Q. B.; *Drury v. Macnamara*, 25 L. J. 5, Q. B.

² *Mundy v. Jolliffe*, 5 M. & Cr. 177.

to be charged therewith, or some other person thereunto by him lawfully authorized."

Under the second section, any lease, extending not more than three years from the time of its creation, and commencing from the date of the lease, and not from a future date; or, if commencing from a future date, not extending more than three years from the date of the lease; may still be proved, as before the statute, by evidence of an oral lease.¹ But it seems that such a lease confers a right of action against a lessee only when he has entered, and not for a non-entry.²

An oral lease for more than three years creates only a tenancy at will,³ which is converted by payment of rent or entry, or apparently by any act in the nature of a recognition of title by the landlord, into a tenancy from year to year, determinable by regular notice.⁴ (As to what constitutes an interest in land, under the statute, see notes to Statute of Frauds, Chitty's Statutes, vol. 2, p. 133; Chitty on Contracts, 270 to 276, 5th ed.; Smith's Contracts, 58 to 65.)

CONTRACTS BY EXECUTORS, &c.

Sect. 4. "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

¹ *Rawlins v. Turner*, 1 Lord Raym. 736; *Riley v. Hicks*, 1 Stra. 651

² *Edge v. Stafford*, 1 Tyr. 293.

³ *Doidge v. Bowers*, 2 M. & W. 365.

⁴ *Clayton v. Blakey*, 8 T. R. 3; 2 Sm. L. C. 74

The agreement must embody the consideration for the promise, and be signed by the executor or the administrator, or an agent.¹

GUARANTIES.

Sect. 4. "No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person . . . unless the agreement, &c." (as in the case of executors, *suprà*.)

The agreement must rest on a valid consideration,² which must be new and executory, except where it is the embodiment of verbal terms on which the contract has been executed, and the guaranty subsequently given in writing.³ But it is the essence of a guaranty that the original debtor should continue liable; and therefore, if his liability be extinguished, and the surety be the only party liable for the debt, his liability will not require to be evidenced by writing. If the person for whose use the goods are furnished is liable at all, any promise by a third person, upon sufficient consideration, to pay that debt, must be in writing.⁴ It is also held that a guaranty requires to be proved by writing only where the promise is given to the creditor, and not where it is given to the debtor or a third person, that the surety will be answerable to the creditor.⁵

¹ *Rann v. Hughes*, 7 Bro. P. C. 556; 7 T. R. 350, n.

² *Semple v. Pink*, 1 Exch. 74.

³ *Eastwood v. Kenyon*, 11 A. & E. 438.

⁴ 1 Wms. Saund. 211 a; note 2; *Birkmyr v. Darnell*, 1 Smith L. C. 134.

⁵ *Eastwood v. Kenyon*, 11 A. & E. 446.

Formerly it was necessary that the guaranty should disclose a consideration on the face of it ; but this is no longer required.¹

CONTRACTS OF MARRIAGE. .

Sect. 4. "No action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage, unless the agreement, &c." (as in the case of executors, *suprà*.)

This provision does not extend to mutual promises to marry,² but only to cases where something collateral to and dependent upon the event of the marriage is the substance of the contract ; as, where A. promises B. so much money in the event of B. marrying A.'s daughter.³ But an oral contract, if complete, will be enforced in equity.⁴

CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

Sect. 4. "No action shall be brought whereby to charge . . . any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, &c." (as in the case of executors, *suprà*.)

The statute does not apply where the contract is capable of being performed by either party within a year from the date of its making.⁵ It applies only when the contract, from its terms, must necessarily

¹ 19 & 20 Vict. c. 97, s. 3.

² *Cock v. Baker*, 1 Str. 34.

³ *Harrison v. Cage*, 1 Lord Raym. 386.

⁴ *Lady E. Thynne v. Earl of Glengall*, 2 H. of L. Cas. 131.

⁵ *Cherry v. Heming*, 4 Exch. 631.

extend beyond the year. Thus, it is held that an agreement to serve for two years certain is within the statute, but not when coupled with a condition that the agreement may be determined at any time by a month's notice.¹

CONTRACTS FOR THE SALE OF GOODS ABOVE 10£.

Sect. 17. "No contract for the sale of any goods, wares or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Under this section there are three statutory modes of proving a contract for the sale or purchase of goods above the value of 10£:

1st. By showing that the buyer accepted, and actually received, part of the goods.

2nd. By showing a payment and receipt of earnest money.

3rd. By showing that the contract, containing the consideration for it, was reduced to writing, and signed at least by the party who is charged upon it.²

Under this section the contract is void, as well as the right of action gone, if its formalities are not observed.³

The writing must be signed by the party charged,

¹ Tindal, C.J.: *Couch v. Stourbridge*, 15 L. J. 170, C. P.

² *Egerton v. Matthews*, 6 East, 307.

³ *Laythorpe v. Bryant*, 2 Bing. N. C. 735.

or by his agent, who, under the seventeenth as well as under the fourth section of the act, may be appointed without writing.¹ An agent must be a third person, and not one of the contracting parties.² Under both sections the contract may be proved by several sufficiently connected writings, but not by the importation of oral evidence.³

The 17th section of the Statute of Frauds is extended by 9 Geo. 4, c. 14, s. 7—

“To all contracts for the sale of goods of the value of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.”

Contracts within both sections may be signed, either with both the Christian and surname, or with the initials of the Christian name prefixed to the whole surname,⁴ or with the surname alone, and at length; but not with merely the initials of the Christian and surname.⁵

It appears to be doubtful whether secondary evidence is admissible of contracts which are within the Statute of Frauds.⁶

WILLS.

Under the 5th section of the Statute of Frauds, which affects all wills up to the 1st of January, 1838,

¹ *Acebal v. Levy*, 10 Bing. 378.

² *Farebrother v. Simmons*, 5 B. & Ald. 333.

³ *Jackson v. Lowe*, 1 Bing. 9.

⁴ *Lobb v. Stanley*, 5 Q. B. 574.

⁵ *Sweet v. Lee*, 3 M. & G. 452.

⁶ *Nichol v. Bestwick*, 28 L. J. 4, Ex.

“all devises and bequests of any lands or tenements” are to be void, unless “in writing and signed by the party so devising the same, or by some other person, in his presence, and by his express directions, . . . and attested and subscribed in the presence of the devisor by three or four credible witnesses.”

Since the 1st of January, 1838, by the new Wills Act, 7 Will. 4 & 1 Vict. c. 26, all wills and testaments, unless such as fall within the few cases in which nuncupative wills are allowed, must “be in writing, and be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:” (sect. 9.)

A recent act, 15 & 16 Vict. c. 24, regulates the requisites of the signatures of wills, and substantially provides that no will shall be invalidated by the mere circumstance that the signature does not follow closely on the end of the will, or that a blank intervenes between the concluding words and the signature.

By the new Wills Act, a will can be revoked by codicil, or other writing, only when such writing has been executed with the formalities prescribed in the case of ordinary wills.

REVIVAL OF DEBTS BARRED BY THE STATUTES OF LIMITATION.

(9 Geo. 4, c. 1.)

In actions of debt or upon the case, grounded upon any simple contract,—

“No acknowledgment or promise by word only {

shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.

“Where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them.”

The acknowledgment must be signed by the debtor, and a signature by an agent will be insufficient.¹ The promise to pay must be express, or sufficient to support a reasonable inference of a promise to pay.² The amount in such a case may be proved by extrinsic oral evidence.³

DEBTS OF INFANTS.

The same statute defines the mode by which a debt contracted during infancy may be adopted by an adult.

Sect. 5. “No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or

¹ *Hyde v. Johnson*, 2 Bing. N. C. 778.

² *Williams v. Griffith*, 3 Exch. 335 ; cf. *Collinson v. Margesson*, 27 L. J. 305, Ex. ; *Everett v. Robertson*, 28 L. J. 23, Q. B.

³ *Cheslyn v. Dalby*, 4 Y. & Col. 238.

ratification shall be made by some writing signed by the party to be charged therewith."

When such an acknowledgment, signed by the infant, is proved, it lies upon him to show that he was an infant when he gave it, if he rely upon a plea of infancy.¹ Any writing, such as that which amounts to the adoption of an agent's act, will constitute an adoption of a debt contracted during infancy.²

REVIVAL OF RIGHTS TO REAL PROPERTY BARRED BY
THE STATUTE OF LIMITATIONS.

(3 & 4 Will. 4, c. 27, s. 14.)

As a general rule, title to land is barred after a lapse of twenty years from the time when the right of action accrued to the claimant, or to the party through whom he derives title : (sect. 2.)

But, by sect. 14,—

"When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same ; and the right of such last-mentioned person, or any person claiming through him, to make an entry of distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

¹ *Hartley v. Wharton*, 11 A. & E. 934.

² *Harris v. Wall*, 1 Exch. 122 ; *s. v. Mawson v. Blane*, 23 L. J. 342, Ex.

It is a question for a judge whether a writing amounts to an acknowledgment of title under this section.¹ In such a case the statute runs again from the time when the acknowledgment was executed or signed, and not from the period at which it bears date.² An answer in Chancery, within the statutory limit, is admissible against its maker.³

REVIVAL OF MORTGAGOR'S TITLE.

(3 & 4 Will. 4, c. 27, s. 28.)

“When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments were given.”

An acknowledgment to a third person is insufficient.⁴

¹ *Doe dem. Curzon v. Edmonds*, 8 M. & W. 402.

² *Jaynes v. Hughes*, 24 L. J. 115, Exch.

³ *Goode v. Job*, 28 L. J. 1, Q. B.

⁴ *Batchelor v. Middleton*, 6 Hare, 83.

The 40th section provides similarly, that no action or suit shall be brought to recover any sum secured on mortgage after twenty years from the date of the right of action, unless in the meantime there shall have been a part payment of the principal or interest, or unless in the meantime some "acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent."

SPECIALTY DEBTS.

Similarly, by 3 & 4 Will. 4, c. 42, s. 3, actions of debt on specialty or *scire facias* are barred after a lapse of twenty years from the date of the right of action, unless such right be similarly extended by an acknowledgment in writing, or by part payment, by the party charged, or his agent.

PRESCRIPTIVE RIGHTS.

(2 & 3 Will. 4, c. 71.)

By the 1st section of this act it is provided, that no claim by custom, prescription, or grant, to any right of common or profit *à prendre* from or upon any lands belonging to the Crown, or any corporation aggregate or sole, shall, with certain exceptions, be defeated after thirty years' uninterrupted enjoyment, by showing title prior to that period; and, after sixty years, such enjoyment shall constitute an indefeasible title, unless it be proved to have been under an express agreement by deed or writing.

REPRESENTATIONS OF CHARACTER.

(9 Geo. 4, c. 14, s. 6.)

“No action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given, concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,¹ unless such representation or assurance be made in writing, signed by the party to be charged therewith.”²

The 2nd section provides that, in similar cases of disputed easements issuing out of similar demesnes, a title shall not be barred by evidence only that it began at a time prior to twenty years previously; and makes the prescription indefeasible after forty years of uninterrupted enjoyment, unless it be shown to have been under an agreement by deed or writing.

The 3rd section makes a right of user of light similarly indefeasible after twenty years of actual enjoyment, unless under an agreement by deed or writing.

Many other cases might be cited, in which the Legislature has made written evidence the only admissible kind of evidence, to the total exclusion of even the most direct oral evidence. But the above enactments are those which are of the most constant practical recurrence, and which have therefore been selected, on due deliberation, as the most suitable for the dimensions of the present work. The different statutes, such as the Statutes of Frauds, of Limitation, and Prescription, will be consulted with the utmost advantage to the practitioner; and also the valuable notes to them in the late edition of Chitty's Statutes, by Messrs. Welsby and Beavan.

¹ *Lyde v. Barnard*, 1 M. & W. 115.

² *Swan v. Phillips*, 8 A. & E. 745; *Devaux v. Steinheller*, 6 Bing. N. C. 84.

CHAPTER IX.

ON THE INADMISSIBILITY OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY WRITTEN EVIDENCE.

WHEN written evidence is primary, and not merely substitutionary in character—or, in other words, when it is made by statute or common law the best evidence—it is clear that the principle of a fundamental rule would be destroyed if a party were allowed to contradict such evidence, or to vary it substantially by the introduction of oral or other extrinsic evidence.

Therefore it is an established and inflexible rule that—

Extrinsic evidence is inadmissible to contradict, add to, or subtract from, or vary, the terms of a written instrument.

Thus, where a contract is required by statute to be in writing, or where it has been reduced to writing by the voluntary act of the parties to it; as long as the writing is producible, it is the only admissible evidence of the terms of the contract. Neither party can show that, before the contract was reduced to writing, the parties agreed to a term which does not appear in the writing, and which is clearly repugnant to its provisions; for all such antecedent oral terms are merged in the express language of the writing. Similarly, neither party can show that, after the contract was reduced to writing, the parties agreed to a new term, which is also repugnant to the terms of the written agreement, unless such subsequent agreement amount

to an entire or partial dissolution of the former contract, or to a new contract founded on a new consideration.

Accordingly, in *Goss v. Lord Nugent*,¹ Lord Denman said :—

“By the general rule of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract; but, after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.”

The general rule, therefore, operates thus:—A contract, which is valid without writing, will, if put into writing, be construed strictly according to the terms of such writing. No new term can be annexed to it, as impliedly contained in it before it was reduced into writing, or while it was being reduced into writing, if such parol term contradict or vary a written term; but the written contract may be wholly or partially waived before breach, and a new written or verbal contract substituted for the erased term of the original contract; and then the residue of the original contract will be construed cumulatively with the new subsequent contract. Thus, there will be no contradiction or variance of the original contract, but merely, first, the erasure of a term, and, secondly, not the insertion,

¹ 5 B. & Ad. 64.

2 L 3

but the annexation, of a new contract. In short, the original contract does not suffer a contradiction, but first loses a term, and then gains a consistent addition and supplement.

It is essential to a right understanding of this branch of the law of evidence to bear the above distinction clearly in mind, as the only apparent solution and reconciliation of many abstract, and seemingly contradictory, principles. For, as, on the one hand, it is an undoubted principle that extrinsic evidence is inadmissible to contradict or to vary a written contract; so it is equally undoubted that such evidence is strictly admissible to prove either the entire or partial dissolution of the original contract; and the substitution or annexation of a new verbal contract; or to explain the original contract. The practical distinction between the explanation and the variance of a written contract is in many cases shadowy, indefinable, and unsatisfactory. But it must always be borne in mind, that however difficult it may be to mark the limit, the theory of the above rule is simple and consistent; and equally so the rule that—

Extrinsic oral evidence is admissible to prove that a written contract, not under seal, has been discharged, either before or after breach.

It must be stated, however, at this point, that this doctrine applies manifestly and indisputably only to such contracts at common law as are not affected by the Statute of Frauds; and it is still doubtful how far a contract, within that statute, can be waived and abandoned, before breach, by a subsequent agreement not in writing. The authorities on this subject are, on the whole, in favour of the affirmative; but the point has never been satisfactorily decided. It may, therefore, be desirable to state concisely the curious uncertainty of the law on this head.

The point arose soon after the statute was passed, and was decided shortly by the Lord Keeper in the

affirmative;¹ but the facts of the case are wanting; and no reasons are assigned, nor does the point seem to have received due consideration. Lord Hardwicke, in two cases, expressed a strong opinion that an interest in land, under a written contract within the statute, could not be waived by naked parol without writing; for an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract.² But this doctrine has been impugned by later authorities. Thus, in *Goss v. Lord Nugent*,³ where the point arose, although it was not necessary to decide it, Lord Denman, in commenting on the 3rd section of the Statute of Frauds, said:—

“As there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing.” But, in a later case, his lordship appears to have doubted the accuracy of his earlier opinion;⁴ and in a case, shortly subsequent, in the Common Pleas, Tindal, C.J., showed a disposition to adopt, to its full extent, the reasoning of Lord Hardwicke.⁵ It appears also, from a still later case, that Lord Denman himself had qualified or abandoned the view which he held in *Goss v. Lord Nugent*. This case is that of *Stead v. Dawber*,⁶ where the action was on a contract for the sale of goods within the 17th section of the Statute of Frauds; and the plaintiff declared on a written agreement, by which the goods were to be delivered on a day certain, and then went on to aver an oral agree-

¹ *Gorman v. Salsbury*, 1 Vern. 239.

² *Buckhouse v. Crossby*, cited 3 T. R. 591; *Bell v. Howard*, 9 Mod. 305.

³ 5 B. & Ad. 58.

⁴ *Harvey v. Graham*, 5 Ad. & Ell. 74.

⁵ *Stowell v. Robinson*, 3 Bing. N. C. 937.

⁶ 10 Ad. & Ell. 57.

ment that the delivery should be postponed to a later day, and breach the non-delivery on such later day. The defendant pleaded the want of a written agreement; and the point for the court was, whether the oral agreement was to be regarded as a variation of the written agreement, or as the introduction of an immaterial term. The court gave judgment for the defendant, on the ground that time was of the essence of the contract, and therefore could not be varied by parol; but it seems also to have been understood that neither could the original contract have been waived by parol. Lord Denman said:—

“Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties; but the statute intervenes, and, in the case of such a contract, takes away the remedy by action.”¹ It is right to observe that this case has been cited with general approbation by Parke, B.²

The main point, therefore, viz., whether a contract in writing, within the Statute of Frauds, can be waived or discharged, before breach, by a subsequent oral agreement, must be regarded as an open question. The courts have never yet found it necessary to declare the law on this subject; and the text writers are at issue on it, as on the *vexata quæstio* of a *scintilla juris*.³

In returning to the general question of the admissibility of extrinsic evidence to affect written instruments, it is to be observed that—

¹ 10 Ad. & Ell. 65.

² *Marshall v. Lynn*, 6 M. & W. 109.

³ Stark. p. 724 (4th edit.); Chitty's Statutes, vol. 1, p. 147, n. affirmant; Rosc. N. P. 18; 2 Phill. 356; Sugd. Vendors and Purchasers, vol. 2, 174, dubitant; cf. *Moore v. Campbell*, 23 L. J. 310, Ex.

A written instrument cannot be released or avoided by evidence of an intrinsically inferior nature.

Thus, a deed must be released by deed, and cannot be avoided by parol. A will must be revoked with the same solemnities which are required to give it validity originally.¹ But where a writing is not under seal, and is not subject to any peculiar statutory requisites, it falls within the definition of parol evidence. Such evidence is generally the same, although, specifically, it may be either written or oral. In such a case, the written instrument does not rank above the oral proof for the purposes of evidence; and therefore, except in a doubtful case, such as that which has just been discussed, a written contract, or other parol instrument in writing, may clearly be discharged by oral evidence.

Thus, the completion of a contract under a written agreement may be proved by oral evidence of performance, or of a discharge from performance. The payment of money, under such a contract, may be shown either by a written receipt, or oral evidence of payment. Both modes of proof are primary in their nature, and therefore, in the absence of any rule which requires written proof, are concurrently and equally admissible forms of *primâ facie* evidence. It is to be observed, also, that performance of a contract under seal is provable by parol. Such evidence does not release or avoid the original contract; it merely shows that it has been satisfied, and leaves its original validity unimpeached.

On the same principle, as it is allowable to show by parol that a specialty contract has been performed, so it is equally allowable to show that it never existed legally; or that it was formed under circumstances which rendered it void in the inception. Thus, a defendant in an action on a written contract, whether by deed or parol, may plead that it was void, as being made under circumstances of fraud, duress, or for

¹ 7 Will. 4 & 1 Vict. c. 26, s. 20; *supra*, p. 382.

illegal consideration ; and he may prove such a plea by any species of parol evidence. He may show that a bill or promissory note, on which he is liable *primâ facie*, was obtained from him without consideration, for the purpose of being discounted by the plaintiff or by a third party, between whom and the plaintiff there is a privity ; or he may show any other similar failure of consideration. And generally, on all parol written contracts, extrinsic evidence will be admissible to support a plea of failure, or want of consideration.

Where it is distinctly stated in a deed that it is made in consideration of a sum of money paid down at the time of excution, a party is estopped from showing that no money passed ;¹ although he may show that a different consideration passed ;² but, where the payment of the consideration is not stated conclusively and unambiguously in the deed, the non-payment may be proved by extrinsic evidence.³ Thus, where a deed recited that a releasee had agreed to pay a certain sum, and then referred to it as "the said sum being now so paid as hereinbefore mentioned ;" then followed words of reference which were equally applicable to the sum in question and other sums mentioned ; then an acknowledgment in the body of the deed of the receipt of such sums ; and a receipt for the first sum was indorsed on the deed : it was held that the acknowledgment in the recital was ambiguous ; that the receipt in the body of the deed was equally ambiguous ; and that the indorsed receipt constituted only rebuttable *primâ facie* parol evidence. On these grounds, a plaintiff in assumpsit was held not to be estopped by the deed from showing by parol evidence that the sum in question, the substantial consideration money, had never been paid.⁴

It is also allowable to prove, by extrinsic evidence, a larger or supplementary consideration ; provided it be not inconsistent with the consideration named in the

¹ *Rowntree v. Jacob*, 2 Taunt. 141.

² *Smith v. Battams*, 26 L. J. 232, Ex.

³ 2 Phill. 346.

⁴ *Lampon v. Corke*, 5 B. & Ald. 606

deed.¹ Thus, a deed, purporting to be founded on a money consideration, may be proved to have been founded also on any other good consideration, such as marriage;² or, not purporting to be founded on any consideration, it may be shown to have been founded on a valuable consideration;³ or, purporting to be founded on natural affection, it may be shown to have been founded also on a valuable consideration, at least to rebut a charge of fraud.⁴ In all such cases the rule which does not permit written evidence to be contradicted or varied by extrinsic evidence remains unaffected, because the extrinsic evidence is received only to annex an incident which is not clearly excluded by the written instrument.

It must be admitted that, in some at least of these cases, there is an apparent infringement of that part of the fundamental rule which prohibits an addition to, or a subtraction from, a written contract by the introduction of oral evidence. But even in the most irreconcilable cases, where there has been the most apparent addition to a contract by oral evidence, the theory of its reception has rested on the assumption that such evidence was merely explanatory.

In *R. v. Scammonden*,⁵ the court held it clear that a "party might prove other considerations than those expressed in the deed;" and allowed extrinsic parol evidence to be given to show that the actual consideration paid was thirty pounds, although the consideration named in the deed and the indorsed receipt was twenty-eight pounds. So, in *R. v. Inhabitants of London*,⁶ the same court held that parol evidence was admissible to import a consideration which converted an agreement of hiring as a servant into an agreement to serve as an apprentice. But, in the former case, the parol consideration appears to have been treated as

¹ *Clifford v. Turrell*, 1 Y. & C. N. C. 138.

² *Villen v. Beaumont*, 2 Dyer, 146 a.

³ *Peacock v. Monk*, 1 Ves. 128.

⁴ *Gale v. Williamson*, 1 M. & W. 405.

⁵ 3 T. R. 474.

⁶ 8 T. R. 379.

explanatory of, and not as additional to, the expressed consideration; and, in the latter case, Lord Kenyon stated that "the parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact." Accordingly, it has been stated that in both these cases the parol evidence was received, not to contradict a written agreement, but to ascertain an independent fact explanatory of it.¹

So, it seems to have been assumed, as it is stated in an equity case, that "a deed, apparently voluntary, may be supported by collateral evidence showing a contract for value."²

It has been held that parol evidence of a valuable consideration, not named in the deed, is admissible to rebut a charge that it was obtained on gratuitous consideration, with intent to defraud creditors; but it seems to have been thought, in this case, that it would not have been admissible to annex an unexpressed consideration under ordinary circumstances.³ Alderson, B., referred to the rule as laid down by Lord Hardwicke, in *Peacock v. Monk*,⁴ that "where any consideration is mentioned as of love and affection only, if it is not also said, 'and of other considerations,' you cannot enter into any proof of any other: the reason is, because it would be contrary to the deed, for, when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other."

An impartial investigation of the preceding cases leads manifestly to the conclusion that the general rule, by which it is not allowable to add to, nor subtract from, the terms of a written contract, especially when under seal, is certain and inviolable; but that there are doubtful cases in which the courts have suffered a term to be imported into the contract, which, although

¹ Williams, J.: *R. v. Stoke-upon-Trent*, 5 Q. B. 308.

² *Pott v. Todhunter*, 2 Collyer, 84.

³ *Gale v. Williamson*, 8 M. & W.

⁴ 1 Ves. sen. 128.

apparently an addition, has been treated either as formal, immaterial, or explanatory. On the other hand, similar evidence has been rigidly excluded in later times, in accordance with the strict rule as it was laid down by Lord Hardwicke. Thus, where a deed purported to convey a messuage and appurtenances; and it was proved that a garden had always been occupied by the grantor, and came within the natural signification of appurtenances; it was held clearly inadmissible to show, either that the garden had been expressly excepted by the conditions of sale, or that the grantee had subsequently declared that the garden had been so excepted. Lord Denman, C.J., said: "This evidence went to contradict the deed, not to apply the words of it to any particular thing; and indeed, as was argued at the bar, the very exception of the garden, in the conditions of sale, shows that if not excepted it would have passed, and therefore shows that to let in evidence of the exception is, in truth, to add to the deed an exception which contradicts it as it now stands."¹

Accordingly, a policy of insurance cannot be contradicted by an antecedent written agreement, as where a defendant attempts to show, by such an agreement, that the risk was to begin at a place and date subsequent to those which are named in the policy;² nor can a charter party be varied by a parol agreement, substituting one place of destination for another,³ unless such an agreement can be treated, not as a new term, but as a new and distinct contract.⁴

Where the fact sought to be added is formal, and not of the essence of the contract, the rule does not appear

¹ *Doe dem. Norton v. Webster*, 12 A. & E. 442.

² *Kame v. Knightley*, Skin. 54.

³ *Leslie v. De la Torre*, cited in *White v. Parker*, 12 East, 383.

⁴ *White v. Parker*, ib.

to apply.¹ Thus, a deed may be proved to have been delivered either before or after the day on which it purports to have been delivered.² But the day appointed in a written contract for the performance of a certain act, such as the completion of a purchase, cannot be altered by extrinsic evidence.³

The admissibility of extrinsic evidence to affect wills will be treated in the following chapter. Some instances will now be given of the application of the rule at present under discussion to ordinary written instruments not under seal.

Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of the sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. Lord Ellenborough, C.J., said: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of the timber would vary the agreement contained in the written conditions of sale."⁴

This case is general in its application; but the rule was probably stated, and observed more inflexibly, because the agreement was clearly within the Statute of Frauds; but it is distinguishable from a later case, which decided that unsigned conditions of sale are only

¹ Tayl. 907.

² *Goddard's case*, 2 Rep. 4 b.

³ *Stowell v. Robinson*, 3 Bing. N. C. 928.

⁴ *Powell v. Edmunds*, 12 East, 6.

in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser.¹

Extrinsic evidence is inadmissible to prove an oral contract contemporaneous with, and purporting to qualify, a written contract; as to show an agreement made contemporaneously with a promissory note that the maker should not be liable when it becomes due. But after the note is made, such a contract, made on valid consideration, may be proved.²

Where a contract for the sale of goods specified no time for removing them, it was held that oral evidence could not be given of a condition that they should be removed immediately.³

So, a written contract to supply flour of X. S. quality, cannot be varied by parol evidence to show that by X. S. quality, the parties intended X. S. S. quality.⁴ So, a written contract to supply foreign refined oil cannot be varied by oral evidence that the parties agreed to consider an inferior kind of oil a foreign refined oil.⁵ So, a policy of insurance cannot be varied by evidence of oral or written declarations which were made to the insurer, but not embodied in the policy.⁶

Where a deed conveys Blackacre, as specified in a schedule and map annexed, parol evidence will not be received to show that Whiteacre, which is not mentioned in the schedule or map, has always been part of Blackacre.⁷

Where several classes of goods, of superior and inferior quality, are comprised under one generic name, and a written contract is made to supply goods of that

¹ *Eden v. Blake*, 13 M. & W. 614.

² *Hoare v. Graham*, 3 Camp. 57.

³ *Greaves v. Ashlin*, 3 Camp. 426.

⁴ *Harnor v. Groves*, 24 L. J. 43, C. P.

⁵ *Nichol v. Godts*, 23 L. J. 314, Ex.

⁶ *Halhead v. Young*, 25 L. J. 290, Q. B.

⁷ *Barton v. Dawes*, 10 C. B. 261.

name, the contract will be fulfilled by a supply of any goods to which that name is applicable; and parol evidence will not be received to show that the parties intended that goods of the superior quality should be supplied.¹

A person who appears on the face of a written contract to have contracted as a principal, cannot show by extrinsic evidence that he contracted as an agent;² nor can he show that a contract, signed by him expressly as a principal, was made by him as an agent for a party to the action.³ But, if the contract appear to have been made merely in his own name, without addition, it may be shown that he was in fact an agent for another.⁴ This is an exceptional case; for generally extrinsic evidence is inadmissible to show that a person not a party to a written instrument on the face of it, was, in fact, a party.⁵ On the same principle, evidence of a custom cannot be received to vary the express language of a contract.⁶

Writings within the Statute of Frauds are construed still more stringently; and parol evidence is still more inadmissible, than even in cases at common law, to contradict or vary the terms of the written contract. The principles by which such contracts are construed have been considered at length; and it is therefore unnecessary to prolong this chapter by a more elaborate treatment of them.⁷

It will be remembered that the rule, to which this chapter has been given, applies only to cases where the written or oral evidence, which it is desired to couple with the principal writing, is repugnant to the terms of the latter. It does not apply to antecedent, collateral

¹ *Smith v. Jeffries*, 15 M. & W. 561.

² *Higgins v. Senior*, 8 M. & W. 834.

³ *Humble v. Hunter*, 12 Q. B. 310.

⁴ *Patteson, J.*: *ibid.*

⁵ *Robinson v. Rudkins*, 26 L. J. 56, Ex.

⁶ *Hudson v. Clementson*, 25 L. J. 234, C. P.

⁷ *Supra*, p. 390, and see *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Stead v. Dawber*, 10 A. & El. 17.

or subsequent agreements, which are not manifestly inconsistent and irreconcilable with the principal writing; or which, in the case of writings not under seal, may be regarded as a partial rescission, and not a mere waiver, of the original contract. The practical difficulty is to determine what is a rescission, which is valid as the basis of a new contract; and what is a mere variation of a term, which is void as inconsistent with the express language of the original and subsisting contract.

It is also to be observed, that, in the case of writings not under seal, the rule is limited to cases in which it is attempted to vary or complete an instrument in writing by the interposition of oral evidence. It does not extend to cases in which it is sought to prove a complete contract by the juxtaposition and comparison of separate but connected writings. All that the rule requires in this instance is that the several writings shall speak for themselves; and that the construction shall not be aided in general by the addition of oral evidence. It is true that a contract, not required to be in writing, may be proved by evidence of an oral acceptance of a written proposal; but where a contract is required to be in writing, the acceptance as well as the proposal must be in writing, and oral evidence cannot be received of any branch of such a contract. But where a contract rests on a number of related papers in which a hiatus appears, the hiatus cannot be supplied by the introduction of oral evidence, or acts of the parties.¹

¹ *Boydell v. Drummond*, 11 East, 142.

CHAPTER X.

ON THE ADMISSIBILITY OF EXTRINSIC EVIDENCE TO
EXPLAIN WRITTEN EVIDENCE.

THE second branch of the principle of evidence, which was discussed in the preceding chapter, is contained in the rule that—

Extrinsic evidence is admissible to explain written evidence.

As in the case of the rule that extrinsic evidence is inadmissible to vary written evidence, it is more easy to illustrate the above rule than to reconcile the decisions under it; but, without investigating all the subtleties of the doctrine, it will be attempted to define its general scope and practical application.

First, parol evidence is admissible to prove that that which purports to be a deed or writing of a certain kind has been made under circumstances which deprive it of all such effect. Thus, it may be shown that a writing, purporting to be a contract, was made subject to a condition, through the non-fulfilment of which no contract has ever arisen.¹ So it may be shown that an instrument, which appears to be a binding one to take effect immediately, was delivered as an escrow, and was not intended to operate until certain things were done;²

¹ *Pym v. Campbell*, 25 L. J. 277, Q. B. ; *Thomas v. Clarke*, 25 L. J. 309, C. P.

² *Davis v. Jones*, 25 L. J. 91, C. P.

and, on the same principle, when an agreement does not declare the time from which and to which it is to operate, parol evidence is receivable to supply the ambiguity.¹ Similar evidence may be given to show on which of two counts of a *Nisi Prius* record damages, which have been entered generally, were actually recovered.²

The law recognises, according to the authority of Lord Bacon, two kinds of ambiguity in written instruments, viz., patent and latent. A patent ambiguity is said to exist when the instrument, on its face, is unintelligible, as where a devise is made, and a blank appears in the place of the name of the devisee. In such a case, extrinsic evidence is wholly inadmissible to show who was intended to be the devisee; for, if it were admissible, it would be tantamount to permitting wills to be made verbally, and would also be a violation of the principle, that where a contract, or other substantial matter of issue, has been reduced to writing, the writing is the only admissible proof of such contract or transaction.

But where a written instrument is intelligible on its face, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms, the ambiguity is said to be latent, and extrinsic evidence will be strictly admissible to explain and apply those circumstances, so as to reconcile them to the terms of the writing. But such evidence will be admissible only to explain, and not to vary. Thus, in *Goldshede v. Swan*,³ Parke, B., said: "You cannot vary the terms of a written instrument by parol evidence: that is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so." The leading principles of this

¹ *Davis v. Jones*, 25 L. J. 91, C. P.

² *Preston v. Peeke*, 27 L. J. 424, Q. B.

³ 1 Exch. 158.

general rule will now be considered under those subdivisions which occur most frequently in practice.

1. Where a written instrument is in a foreign language, or where it contains technical words of trade or custom, the ambiguity will be treated as latent; and oral or other extrinsic evidence will be received to inform the court of the sense of the instrument.¹ Thus, in *Shore v. Wilson*, Parke, B., said: "I apprehend that there are two descriptions of evidence . . . which are clearly admissible for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate."

Accordingly, extrinsic evidence was received in this case to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that, according to the usage of a sect to which the grantor belonged, the grant was intended for that sect. So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeple-chase transaction;² that "close," by local usage, signified "a

¹ *Shore v. Wilson*, 9 Cl. & Fin. 555, Parke, B.

² *Evans v. Pratt*, 3 M. & G. 759.

farm ;”¹ that “a thousand” means a hundred dozen;² that a contract to pay an actor so much a week was a contract to pay only during the theatrical season.³ So, also, it is received to explain the local meaning of “good” or “fine” barley ;⁴ of a month, whether lunar or calendar ;⁵ the amount indicated under a contract to buy “your wool” from a party ;⁶ and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places. But it is essential in all such cases that the peculiar sense should be of a public and popular kind; and it will not be allowable to show that a party used the term in a sense opposed to its local and conventional usage.

2. Extrinsic evidence is admissible to explain a latent ambiguity which is raised, not by any intrinsic obscurity of language, but by a difficulty created by extrinsic circumstances in applying the terms of a written instrument to such extrinsic circumstances. Thus, where it is shown that words apply equally to two different things or subject-matters, extrinsic evidence is admissible to show which of them was the thing or subject-matter intended.⁷ A familiar illustration of this doctrine is cited from Lord Bacon, where a man devises his manor of S. to J. F., and it turns out that he has two manors answering the description, *e. g.*, North S. and South S. In such a case it may be shown by extrinsic evidence, and even by declarations of the testator, which manor was intended to pass.⁸ But it is only in such a case, where a will is in dispute, that extrinsic evidence of a testator’s intentions is admis-

¹ *Richardson v. Watson*, 4 B. & Ad. 799.

² *Smith v. Wilson*, 3 B. & Ad. 728.

³ *Grant v. Maddox*, 15 M. & W. 737.

⁴ *Hutchinson v. Bowker*, 3 B. & Ad. 278.

⁵ *Simpson v. Margitson*, 11 Q. B. 32.

⁶ *Macdonald v. Longbottom*, 7 W. R. 507.

⁷ Alderson, B.: *Smith v. Jeffries*, 15 M. & W. 562.

⁸ *Doe dem. Good v. Needs*, 2 M. & W. 129, Parke, B.

sible to explain ; and, generally, all extrinsic evidence of a testator's intentions is inadmissible to aid the construction of his will.¹ This latter principle constitutes the second branch of the rule, as laid down by Parke, B., in *Shore v. Wilson*,² where it was held that evidence of Lady Hewley's peculiar usage of a phrase was inadmissible to show her intention in making the grant. Parke, B.,³ continuing the remarks already cited, said : " For the purpose of applying the instrument to the facts, and to determine what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the whole instrument, as near as may be in the situation of the parties to it. . . . From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the court, without evidence, may of itself notice, it is its duty to apply and construe the instrument ; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible ; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written." His lordship therefore held, with the other judges, that, although extrinsic evidence was clearly admissible to show that the words " godly preachers of Christ's Gospel" had " acquired by usage a peculiar meaning, either amongst a particular class to which Lady Hewley belonged, or in the peculiar locality where she dwelt, or perhaps generally throughout the kingdom at the time when the deed was executed ; or the court might have informed itself from history, and other

¹ *Doe dem. Hiscock v. Hiscock*, 5 M. & W. 369.

² 9 Cl. & Fin. 556, and sup. p. 404.

³ 9 Cl. & Fin. 556.

general sources of information, of the meaning of the language used at that particular time ;” evidence of parol declarations by Lady Hewley, to show that she had used the words in a peculiar sense, was inadmissible.

So, a witness cannot be asked what a testator said about property, not distinctly devised, in order to show it was intended to pass with other property devised.¹ But a bequest to Mrs. G. has been upheld by evidence that the testator was in the habit of calling a Mrs. Gregg, Mrs. G.² Here the evidence was a fact, not a declaration. So, parol evidence is admissible to show what lands of the testator were reputed to lie in a parish, in order to construe a devise of lands in the parish.³ So, in all cases where extrinsic evidence has been received to explain written evidence, it will appear that it has been received, not in the form of declarations of intention by parties, but in the form of collateral and surrounding facts, which, like every other species of presumptive evidence, may reasonably be connected with the substantial issue, and so form data to aid the court or jury.⁴ They must be related to the written evidence, and yet independent of it. They must not be personal declarations of a party, but distinct incidents, which may be presumed to have been present to the mind of the party, without wearing the suspicious form of oral statements. Thus the strict sense of a word is its legal sense ; and if it be intelligible in this sense, it cannot be varied or explained by evidence that it was used by the party in a popular, still less in a peculiar sense. Therefore, if a man devise to his “children” and he has legitimate children, only the former will take. Extrinsic evidence cannot be received to show that he intended that his illegitimate children should also take. But where

¹ *Doe dem. Hubbard v. Hubbard*, 15 Q. B. 228.

² *Abbott v. Morice*, 3 Ves. 148 ; *s. v. Rolfe*, B., 18 M. & W. 204.

³ *Anstee v. Nelms*, 26 L. J. 5 Ex.

⁴ *Smith v. Thompson*, 8 C. B. 44.

there are no legitimate children to take, the illegitimate will take; or where there is a devise to children, and the evidence shows only one legitimate child, and children who are illegitimate, the latter will take equally with the former.¹ In such a case the extrinsic evidence as a collateral fact is strictly admissible to explain a written instrument which would otherwise be insensible.

3. Usage or custom is also admissible to explain and control, but not to contradict, a written instrument, such as a contract. "It is admissible to explain what is doubtful; it is never admissible to contradict what is plain."² Therefore, wherever the language of a written instrument is so clear that there can be no reasonable ground for construing it as subject to a custom; or where, although the language is ambiguous, the custom itself is uncertain, the writing must be construed strictly according to its literal terms.³

On the general principle, it has been held allowable to show that, by the custom of the country, a provision in a lease as to ten thousand rabbits, signified twelve hundred to the thousand;⁴ that "acre" and "perch" mean one quantity in one county, and another quantity in another county.⁵ So usage is admissible to explain the phrase "regular turns of loading."⁶ In such cases the customary meaning of an ambiguous term is for the jury; as where the question is whether "a month" signifies a lunar or calendar month, by the custom of the district.⁷ But, unless such a custom be proved, a judge ought not to leave it to the jury to pronounce on the sense in which the term was used, but should himself construe the term according to its fixed legal or

¹ *Gill v. Shelley*, 2 Phill. 373.

² *Hall v. Janson*, 24 L. J. 97, Q. B.; Lord Lyndhurst; in *Blackett v. Royal, &c. Company*, 2 C. & J. 244.

³ *Re Stroud*, 8 C. B. 502; *Hurst v. Usborne*, 25 L. J. 209, C. P.

⁴ *Smith v. Wilson*, 3 B. & Ad. 728.

⁵ *Barksdale v. Morgan*, 4 Mod. 186.

⁶ *Leidemann v. Schultz*, 23 L. J. 17, C. P.

⁷ *Barksdale v. Morgan*, 4 Mod. 186.

popular signification. Thus, in *Simpson v. Margetson*,¹ where an auctioneer sued for a sum he was to receive by a written contract, only if he sold "within two months;" it was held that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months, and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, "the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word therein, of a settled primary meaning, from the judge and transfer it to the jury." "If," continued Lord Denman, "the context shows that calendar months were intended, the judge may adopt that construction. If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary sense, the judge may construe it, from such circumstances, according to the intention of the parties. If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense. If the meaning of a word depends upon the usage of the place, where anything under the instrument is to be done, evidence of such usage must be left to the jury. Also, the jury may have to give the meaning of some technical words." This doctrine corresponds with the general rule as to all cases of latent ambiguity in writings, as laid down by Maule, J.: "I agree that, generally speaking, the construction of a written contract is for the court; but when it is shown by extrinsic evidence that the terms of a contract are ambiguous, evidence is admissible to explain the ambiguity, and to show what the parties really meant. This is one of Lord Bacon's maxims. Where there is an election between two meanings it is properly a question for the jury. So, if a man devise

¹ 11 Q. B. 23.

land to his 'cousin John,' and it appears that he has two cousins named John, extrinsic evidence is admissible to show to which of them he meant the land to go,"¹ and the jury would have to name the devisee. So, generally, where there are two alternative constructions, usage will be received to determine which is the right one.²

Where a doubt is raised by evidence upon the meaning of a written contract, extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect, to explain or remove such doubt. So, also, where a similar doubt arises as to the *lex loci* by which such a contract is to be construed, evidence of usage will be received to determine the place. Thus, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment.³

Extrinsic evidence is also admissible to annex incidents to a written instrument, where such incidents are consistent with the reasonable intention of the writing. Such incidents fall generally within the definition of express or implied usage. In such cases the notoriety of the usage makes it an element of the writing. Thus, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays.⁴ "It has long been settled that in commercial trans-

¹ *Smith v. Thompson*, 8 C. B. 59.

² *Blackett v. Royal, &c. Company*, 2 C. & J. 250, 251.

³ *Bottomley v. Forbes*, 5 Bing. N. C. 121.

⁴ *R. v. Stoke-upon-Trent*, 5 Q. B. 303.

actions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.”¹ “Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated, if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it, and arrive at its true meaning. Again, in all contracts as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing; partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded, because the

¹ Parke, B.: 1 M. & W. 474.

words are in their ordinary meaning unambiguous ; for the principle of admission is, that words, perfectly unambiguous in their ordinary meaning, are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day' ? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred ; 'a week' only a week during the theatrical season ; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts, the written contract—it only ascertains it by expounding the language."¹

The principles of this branch of evidence may be treated as fully expounded in the above luminous judgments of two of the most eminent of contemporary judges. A few illustrations will complete the practical outline of the doctrine. In *Browne v. Byrne*, a bill of lading specified a certain sum as payable for freight, and it was held that an indorsee, in an action for the amount, might give evidence of a customary deduction. The extrinsic evidence in this case, although bordering on repugnancy, was received because the bill of lading merely specified a sum certain for freight, without stipulating that it was to be free of all deductions. "If the bill of lading had expressed, or if from the language of it the intention of the parties could have been collected, that the freight at the specified rate should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the usage."²

So, under a contract to carry a full and complete cargo of molasses from London to Trinidad, evidence has been received to qualify the contract by showing that a cargo is full and complete, if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel.³

¹ Coleridge, J.: *Browne v. Byrne*, 23 L. J. 313, Q. B.

² 23 L. J. 316, Q. B. ; *s. v. Phillipps v. Briard*, 25 L. J. 233, Ex.

³ *Cuthbert v. Cumming*, 24 L. J. 311, Ex. ; Sc. Cam.

So, where the defendants bought as brokers for a principal, whose name they did not disclose at the time of contract, it has been held that evidence of a custom will be admitted to show that in this case the broker is personally liable on the contract.¹ So, it may be shown that by the usage of trade an inferior kind of palm oil answers to the description of "best palm oil."²

Similarly, it is a leading principle that an agricultural custom, as that a tenant shall have an away-going crop, is good if not repugnant to the terms of a lease, although the lease says nothing about it; but not if the custom be repugnant to the express or implied terms of the lease.³ If the custom appear to be in a high degree unreasonable it will be strong evidence for a jury that it does not exist.⁴

When the usage is inconsistent with the express or implied terms of the written contract, it will be inadmissible to control it, on the principle *expressum facit cessare tacitum*.⁵ Where parties have come to an express contract, none can be implied; and, therefore, where a person contracts by writing in express terms, he cannot sue on an implied *assumpsit*.⁶ And it seems that no usage will be binding on a party unless the circumstances raise a sufficient presumption that he knew of its existence, and contracted with reference to it.⁷

Extrinsic evidence is not only admissible, but necessary to explain any alteration or interlineation that may appear in a written instrument. Generally the party tendering it in evidence must account for the alteration.⁸ If

¹ *Humfrey v. Dale*, 26 L. J. 137, Q. B. ; Sc. Cam. : 27 L. J. 390, Q. B.

² *Lucas v. Bristow*, 27 L. J. 364, Q. B.

³ *Wigglesworth v. Dallison*, Dougl. 201 ; 1 Smith L. C. 299, and notes.

⁴ *Bottomley v. Forbes*, 5 Bing. N. C. 128.

⁵ *Blackett v. Royal Exchange Company*, 2 Tyrw. 266.

⁶ *Cutler v. Powell*, 2 Smith L. C. 1.

⁷ *Kirchner v. Venus*, 7 W. R. 455.

⁸ *Clifford v. Parker*, 2 M. & G. 909.

it appear to have been made contemporaneously with the instrument, or if it be made subsequently to its execution, with the privity of the parties, and there be no fraud on or evasion of the stamp laws, its validity may be maintained. But if the alteration be material,¹ as if the date,² or amount, or time of payment of a bill of exchange be altered,³ or a joint responsibility converted into a joint and several responsibility;⁴ the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed.⁵ So, where a bill has been altered with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged.⁶ The same rule holds when the alteration is accidental,⁷ or by a stranger without the privity of either party.⁸

The last case requiring notice in this chapter is when a contract is partly in writing and partly verbal; or when terms are offered in writing, and accepted verbally. At common law, such a combination of written and verbal evidence is strictly admissible to prove a complete contract, but not where the contract or other transaction is required to be in writing. Thus a contract, required by the Statute of Frauds to be in writing, must be wholly in writing; and such a contract cannot be proved by writings which require oral evidence to complete or connect them.⁹

¹ *Gardner v. Walsh*, 24 L. J. 285, Q. B.

² *Clifford v. Parker*, 2 M. & G. 905.

³ *Warrington v. Early*, 23 L. J. 47, Q. B.

⁴ *Alderson v. Langdale*, 3 B. & Ad. 660.

⁵ *Perring v. Hone*, 4 Bing. 28.

⁶ *Master v. Miller*, 1 Smith L. C. 490, and notes.

⁷ *Burchfield v. Moore*, 23 L. J. 261, Q. B.

⁸ *Davidson v. Cooper*, 11 M. & W. 778; S. C., 13 M. & W. 352; *Crookwit v. Fletcher*, 28 L. T. Rep. 322.

⁹ *Boydell v. Drummond*, 11 East. 142.

CHAPTER XI.

ON STAMPS.

IN this chapter only the leading principles of the numerous stamp laws will be stated, so far as they control the admissibility in evidence of written documents.

The general rule is that, where a stamp is essential to the legal validity of a writing, the writing cannot be given in evidence in civil proceedings if it be unstamped, or insufficiently stamped.

This rule does not extend to criminal proceedings, for, by the 17 & 18 Vict. c. 83, s. 27, it is enacted that "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon, or affixed thereto."

The strictness of the rule has also been recently relaxed in the case of proceedings in the superior common law courts, by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 28, 29), which requires the officer of the court to direct the attention of the court at the trial to any apparent insufficiency of the stamp; and empowers him to affix the proper stamp, on payment of the amount and penalty from the party tendering the writing in evidence. The following are the sections:—

Sect. 28. "Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document, to call the attention of the judge

to any omission or insufficiency of the stamp ; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence, until the whole, or (as the case may be) the deficiency of the stamp duty and the penalty required by statute, together with the additional penalty of one pound, shall have been paid."

Sect. 29. "Such officer of the court shall, upon payment to him of the whole, or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds ; and an entry of the fact of such payment, and of the amount thereof, shall be made in a book kept by such officer ; and such officer shall, at the end of each sittings or assizes (as the case may be), duly make a return to the Commissioners of the Inland Revenue of the moneys, if any, which he has so received by way of duty or penalty, distinguishing between such moneys, and stating the name of the cause, and of the parties from whom he received such moneys, and the date, if any, and description of the document for the purpose of identifying the same ; and he shall pay over the same moneys to the Receiver-General of the Inland Revenue, or to such person as the said commissioners shall appoint or authorize to receive the same ; and the said commissioners shall, upon request and production of the receipt hereinbefore mentioned, cause such document to be stamped with the proper stamp or stamps in respect of the sums so paid as aforesaid ; provided always, that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof, on payment of the duty and a penalty."

The 31st section enacts that "no new trial shall be

granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." A judge holding a stamp to be sufficient should not reserve the question of sufficiency for the court above.¹

The three sections, quoted above, must be held as confined to the superior courts of common law, to which the operation of the act is restricted. In all other courts, except criminal courts, or where the benefit of the above act is not claimed by the party tendering the unstamped or defectively-stamped writing, the writing will be *primâ facie* inadmissible, if it be the foundation of the party's case, or essential to it.

A deed or instrument requiring a stamp should be stamped before it is executed or signed; and where it is tendered to be stamped after the execution or signature, a penalty in addition to the amount of the stamp will be payable; but the Commissioners of the Inland Revenue have the power of remitting the penalty, if an application for the remission be made within twelve months from the making of the instrument; and if they are satisfied that the omission arose from accident, and without any intention to defraud the revenue.²

If an agreement be no more than a proposal, it does not require a stamp; but when it is either an agreement strictly, or evidence of one, it must be stamped, if the subject-matter be above 20l.³

The party who objects to the want or sufficiency of a stamp must prove it;⁴ and the judge will determine the question before the instrument can be shown to the jury.⁵ But when there is a dispute as to whether a proper amount of stamp duty has been paid, the

¹ *Siordet v. Kneyinski*, 25 L. J. 2 C. P.

² 13 & 14 Vict. c. 97, s. 12.

³ *Hegarty v. Milne*, 23 L. J. 151, C. P.

⁴ *Doe v. Coombs*, 3 Q. B. 687.

⁵ *Jardine v. Payne*, 1 B. & Ad. 670; Lord Tenterden.

adjudication of the Stamp Commissioners under the 13 & 14 Vict. c. 97, s. 14, is said to be final.¹

Where an agreement, which appears to be in writing, is in dispute between parties, it must, according to the rule which requires the best evidence, be produced; and when produced, if it appear to require a stamp, it will be inadmissible unless it be properly stamped. Thus, where it appears in the course of a party's case that there is a written agreement, bearing directly on the points at issue, he must produce it duly stamped.² Such an agreement cannot be treated as a nullity, if it be produced and appear to be unstamped; and therefore it has been held that a county court judge was wrong in allowing parol evidence to be given of an agreement contained in an unstamped writing.³ But where a party succeeds in establishing his case by oral evidence, the opposite party cannot defeat it by merely producing an unstamped written agreement. Thus, where the plaintiff closed his case without anything appearing to show that there was a written agreement between her and the defendant as to the subject-matter of the action, the defendant was held not entitled to call for a nonsuit by producing a paper purporting to be an agreement, but unstamped.⁴ This case, although apparently contradicted by the recent case of *Delay v. Alcock*, will be reconciled with it by presuming that, in the latter case, the defendant was called as a witness by the plaintiff, and that the existence of the unstamped agreement was disclosed in the course of the plaintiff's case. If that had closed without evidence of an agreement in writing, it appears, on the authority of *Magnay v. Knight*, that the defendant could not have nonsuited the plaintiff by producing an unstamped written agreement.

When it is necessary to produce the writing, or

¹ *Morgan v. Pike*, 23 L. J. 54, C. P.

² *Buxton v. Cornish*, 12 M. & W. 426.

³ *Delay v. Alcock*, 24 L. J. 68, Q. B. ; *s. v. sup.* p. 276.

⁴ *Magnay v. Knight*, 1 M. & G. 944.

account for its absence, secondary evidence will not be received, if it appear that the original required a stamp, and that it was unstamped.¹ But a writing requiring a stamp will be presumed to have been properly stamped;² and so as against a party refusing to produce it after notice.³ But such a presumption may be rebutted by evidence that the writing was not stamped.⁴ If it be shown that a lost document was at one time unstamped, this fact alone will raise a presumption that it continued without a stamp.⁵

When an instrument purports to have been stamped, but no stamp appears, or one partially effaced, the judge may receive the writing, if the want of the stamp or its erasure be satisfactorily explained to him.⁶

An unstamped instrument, inadmissible as an agreement, may yet be admissible to prove a collateral or independent fact. Thus, a cheque, drawn beyond the legal limits, has been received to prove the receipt of money by a holder, but not to discharge the banker;⁷ an unstamped receipt to show that goods were sold to a third person, and not to the defendant;⁸ an unstamped agreement to show an illegal consideration for a debt;⁹ but it cannot be presented to a jury as evidence of any part of the substantial claim of a party.¹⁰ It may be handed to a witness to refresh his memory; and when it is a document, which for some purposes requires a stamp but not for others, it will be strictly admissible for such latter purposes. Where a document is void as a receipt for want of a stamp, it may

¹ *R. v. Castle Morton*, 3 B. & Ald. 588.

² *Pooley v. Goodwin*, 4 A. & E. 94.

³ *Crisp v. Anderson*, 1 Stark. 85.

⁴ *Crowther v. Solomons*, 6 C. B. 752.

⁵ *Closmadene v. Carrel*, 25 L. J. 216, C. P.

⁶ *Doe v. Coombs*, 3 Q. B. 687.

⁷ *Blair v. Bromley*, 11 Jur. 617.

⁸ *Miller v. Dent*, 10 Q. B. 846.

⁹ *Coppock v. Bower*, 4 M. & W. 361.

¹⁰ *Jardine v. Payne*, 1 B. & Ad. 670.

be made evidence of an account stated, or other outstanding accounts.¹

Where an instrument is inadmissible by reason of the stamp laws it will be allowable to resort to other admissible evidence. Thus, when a promissory note is defectively stamped, a holder may give evidence, on the common counts, of the original consideration ; as by showing on a count for money lent that the defendant has acknowledged the debt for which the note was given.² So, when a receipt is unstamped, he may prove payment by oral evidence.³

DENOMINATION OF STAMP.

(55 Geo. 3, c. 184, s. 10.)

“From and after the passing of this act all instruments, for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law ; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument by having its name on the face thereof.”

This section gives effect to a stamp which is not less in amount than the proper stamp, provided it be not specially appropriated to any other instrument by having its name on the face thereof.⁴

¹ *Matheson v. Ross*, 2 H. L. Cas. 301.

² *Farr v. Price*, 1 East, 56.

³ *Rambert v. Cohen*, 4 Esp. 213.

⁴ Patteson, J. : *Lucan v. Jones*, 5 Q. B. 953.

ALTERATION OF A STAMPED DOCUMENT.

A material alteration in a writing requiring a stamp, after it has been made or executed, avoids the stamp, and renders a fresh stamp necessary ; but not so if the alteration be immaterial, or according to the original intent of the parties.¹

Thus, when the defect is unintentional, and the alteration makes the writing merely what it was intended originally to have been, it will not require to be re-stamped.² Where a promissory note was made originally payable to the plaintiff, who complained that it ought to have been payable to order, it was held that, as between the parties to the note, the interlineation of the words, "or to order," did not render a new stamp necessary.³ So, when a bill is altered by the consent of parties before the note has issued, it will not require to be re-stamped.⁴ But when the bill has issued, and where the alteration is material and varies the essential character of the writing, so as to amount to a new contract, a new stamp will be required, notwithstanding the consent of the parties to the alteration.⁵

TIME OF OBJECTING TO THE WANT OF STAMP.

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered, and before it is received in evidence. If the instrument be received, and read without objection, it cannot afterwards be objected to for want of a stamp. Such a deficiency is clearly not ground for a new trial ; but it may be doubted whether

¹ *Master v. Miller*, 1 Smith L. C. 457, and notes.

² *Cole v. Parkin*, 12 East, 471.

³ *Byrom v. Thompson*, 1 A. & E. 31.

⁴ 1 Smith L. C. 490 a.

⁵ *Bowman v. Nicholl*, 5 T. R. 537 ; 1 Smith L. C. 490 a.

a judge at Nisi Prius has not at least a discretionary power to reject a document which, after being put in, appears to be unstamped, or insufficiently stamped.¹ But, generally, an objection to an unstamped writing should be taken before it is read in evidence.²

It has been said that since the 17 & 18 Vict. c. 125, s. 28, an adverse party cannot object to the production of a writing on the ground of its being unstamped or insufficiently stamped, since under that clause it is the duty of the judge and the clerk of assize alone to notice such deficiencies.³ This doctrine seems to require confirmation.

Such are the general principles of the Stamp Laws in their application to the Law of Evidence. The amount of stamp payable on different writings will be found in the various statutes. (See Chitty's Statutes, Stamps, vol. 3, and Tilsley on Stamps.)

¹ *Field v. Wood*, 7 A. & E. 114.

² *Foss v. Wagner*, 7 A. & E. 116, note.

³ Per Watson, B.: *Franklin v. Harris*, Bristol Spring Assizes, Western Circuit, 1859, M.S.

PART III.

CHAPTER I.

ON THE ATTENDANCE OF WITNESSES.

PROCESS.

THE attendance of witnesses in the superior courts of common law, in courts of equity, and, when such process is necessary, in the criminal courts, is obtained by serving the witness with a *subpœna ad testificandum*. The following is the form in the superior courts of common law:—

SUBPŒNA AD TESTIFICANDUM.

“Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to A.B. [*name of all the witnesses included in the subpœna*] greeting: We command you that, laying aside all and singular business and excuses, you, and every of you, be and appear in your proper persons before our right trusty and well beloved Sir Alexander Edmund Cockburn, our chief justice assigned to hold pleas

in our court before us [*or*, in Common Pleas, “before Sir William Erle, Knight, our chief justice of the Bench;” *or*, in the Exchequer, “before Sir Frederic Pollock, lord chief baron of our Court of Exchequer at Westminster”] at the Guildhall of the city of London [*or*, in Middlesex, “at Westminster Hall in the county of Middlesex,” *or*, at the assizes, “before our justices assigned to take the assizes in and for the county of at in the said county”] on the day of instant [*or* “next”] by of the clock in the forenoon of the same day, to testify all and singular those things which you or either of you know in a certain cause now depending in our court before us at Westminster, between *C. D.* plaintiff and *E. F.* defendant, in an action on promises [*or whatever the cause of action is*] on the part of the plaintiff [*or* “defendant”] and on that day to be tried by a jury of the country; and this you, or any of you, shall by no means omit under the penalty upon each of you of 100*l.* Witness [*name of chief justice or chief baron*] at Westminster, the day of in the year of our reign.” [*Only four witnesses can be included in this writ.*]

Where the witness is required to produce documents in his custody, he must be served with a

SUBPÆNA DUCES TECUM.

“Victoria, &c. (*as in common subpæna to the day of trial, then proceed*) and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the documents which the witness is required to produce, e.g., a certain instrument purporting to be an indenture of lease, made between A. B. on the one part, and C. D. of the other part, and dated the day of 1859.*]

PENALTY FOR NON-ATTENDANCE.

(5 Eliz. c. 9, s. 12.)

“If any person upon whom any process out of a court of record shall be served to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed, do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l.*, and yield such further recompense to the party grieved as by the discretion of the judge of the court, out of which the process issues, shall be awarded.”

If a witness do not attend on his subpoena, he may be proceeded against in either of three ways:—

1st. Under the above statute he may be sued in an action of debt for the penalty of 10*l.*, and further recompense; or,

2nd. In an action on the case for damages;¹ or,

3rd. He may be attached for contempt of court: but, on the motion for an attachment, it must be shown distinctly on affidavit that the witness was served; that his expenses were paid or tendered to him at the time of service; and that everything reasonable has been done to secure his attendance.²

ATTENDANCE IN CRIMINAL PROCEEDINGS.

Generally the witnesses for a prosecution are bound over, by the committing magistrate or coroner, on

¹ *Pearson v. Isles*, Dougl. 561.

² *Garden v. Cresswell*, 2 M. & W. 319.

recognizances conditioned to be forfeited if the witness do not appear to give evidence on the trial of the prisoner ; but, if a witness be not so bound over, his attendance may, and ought to be, secured at the trial by serving him previously with a subpoena to appear and give evidence, on the prosecution of the prisoner, at the trial. A magistrate or coroner may bind over a person to appear as a witness at the trial, at any time before the trial, and may commit him if he refuse to be bound over. If the witness do not appear, the recognizance is forfeited and the penalty levied. A subpoena may be obtained at the Crown Office in London, from the clerk of assize at the assizes, and the clerk of the peace at quarter sessions. If a subpoenaed witness do not attend he may be attached, or indicted.¹ A prisoner may subpoena witnesses for his defence.²

ATTENDANCE IN COURTS OF EQUITY.

The attendance of witnesses in court, or before examiners in courts of equity, is obtained by subpoena, and substantially under the same conditions and liabilities as govern and exist in the courts of common law. The form of the writ is given by the 24th Order, May 1845, and it may contain three names only.³ (8th Order.)⁴

The 24th Order directs that—

“ All writs of subpoena in this court are to be prepared by the solicitor of the party requiring the same ; and the seal for sealing the same is to be marked or inscribed with the words “ Subpæna Office, Chancery ; ” and such writs are to be in the terms mentioned at the

¹ Wels. Cr. Pr. 227, 228.

² 1 Anne, c. 9, s. 3.

³ Ayck. Ch. Pr. 155.

⁴ Ayck. Form, 44, 45.

foot of these orders, or as near as may be, with such alterations and variations as circumstances may require."

By the 15 & 16 Vict. c. 86, s. 39, courts of equity are empowered to require the attendance and oral examination of any witness or party to a cause; and by the 40th section of the same act any party to a suit or matter depending in the said court may, by writ of *subpœna ad testificandum*, or *duces tecum*, require the attendance of any witness before an examiner of the court, or an examiner specially appointed.

ATTENDANCE IN THE BANKRUPTCY COURTS

Is enforced by summons from the court before adjudication; and, after adjudication, the court may summon any person known or suspected to be connected with the bankruptcy transaction, and, in the event of contempt, may issue a warrant for the apprehension of the witness. The summons may be *duces tecum*. (12 & 13 Vict. c. 106, ss. 100, 120.)

ATTENDANCE IN THE INSOLVENCY COURTS

Is enforced under 1 & 2 Vict. c. 110, s. 27, by an ordinary subpœna, purporting to be signed by the commissioners, and actually signed by the clerk of the court: (see also 10 & 11 Vict. c. 102, ss. 4, 6, 8.)

ATTENDANCE IN THE COUNTY COURTS.

(9 & 10 Vict. c. 95.)

Sect. 85. "Either of the parties to the suit, or any other proceeding under the act, may obtain, at the office of the clerk of the court, summonses to witnesses, to be served by one of the bailiffs of the court, with or without a clause requiring the production of books, deeds, papers, and writings, in their possession or control; and in any such summonses any number of names may be inserted."

Sect. 86. "Every person on whom any such summons shall have been served, either personally or in such other manner as shall be directed by the court, and to whom at the same time payment, or a tender of payment, of his expenses shall have been made on such scale of allowance as shall be from time to time settled by the general rules of practice of the court, and who shall refuse or neglect, without sufficient cause, to appear or to produce any books, papers, or writings required by such summonses to be produced, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine not exceeding ten pounds as the judge shall set on him; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed."

Where the witness is beyond the jurisdiction of the court, the summons is sent by the bailiff to the bailiff of the court of the district in which the witness resides. But the legality of this practice is questioned by Mr. Taylor.¹ The above act is to be construed with 19 & 20 Vict. c. 108.²

¹ Tayl. 1013.

² Sect. 3.

ATTENDANCE IN MAGISTERIAL PROCEEDINGS.

At common law magistrates may summon any person to attend as a witness on a criminal charge, and, on non-attendance, may issue a warrant for his apprehension.¹ When the proceeding is in the nature of a civil proceeding, as in settlement cases, it appears that the proper process is by writ of *subpœna* or *subpœna duces tecum*, issuing from the Crown Office.² In cases within the 11 & 12 Vict. c. 43, magistrates are empowered by s. 17 either to issue a summons in the first instance, and a warrant for the apprehension of the witness in the event of disobedience; or, if the magistrate be satisfied that it is probable the witness will not attend, he may issue his warrant in the first instance. On indictable charges magistrates have a statutory power to summon witnesses.³

ATTENDANCE IN OTHER CASES.

Revising barristers may summon in their own names any assessor, collector of taxes, or overseer of a past year, to attend before him and give evidence on oath.⁴ Arbitrators, under a reference by rule of court, may similarly order the attendance of witnesses; and non-attendance, after such an order and a tender of expenses, is a contempt of court.⁵ If the witness be in prison, a *habeas corpus ad testificandum* may issue to bring him up.⁶ In the House of Lords the summons is by an order of the House, signed by the assistant clerk of the Parliament; in the House of Commons,

¹ *Evans v. Rees*, 12 A. & E. 55.

² *R. v. Inhabitants of Orton*, 7 Q. B. 120.

³ 11 & 12 Vict. c. 42, s. 16.

⁴ 6 & 7 Vict. c. 18, s. 30.

⁵ 3 & 4 Will. 4, c. 42, ss. 39, 40.

⁶ *Graham v. Glover*, 25 L. J. 10, Q. B. ; *Marsden v. Overbury*, 25 L. J. 200, C. P.

by an order of the House, signed by the clerk ; in Select Committees, by an order of the chairman ; in Election Committees, by a summons from the committee, or by a Speaker's warrant.¹

WHERE A WITNESS IS BEYOND THE JURISDICTION OF THE COURT.

In this case the process of the courts, with the exception of the process of the superior common law courts, does not reach a witness ; and the examination must be by means of commission, the proceedings of which will be regulated by the law of the country to which it issues.² Where the commission issues to a part of the realm which is subject to different laws from that part in which the commission issues, the commissioner may, by a written notice, signed by him, require the attendance of a witness, and, on his refusing to attend, may apply to the local courts for an order to compel attendance ; and the witness will then be subject to the ordinary penalty for disobeying a subpoena, or a writ in the nature of a subpoena.³

But, by a recent act,⁴ the judges, or a judge of the superior courts of common law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, may, at discretion, in any action pending in any such court, issue a *subpœna ad testificandum*, or *duces tecum*, or warrant of citation, commanding a witness in any part of the United Kingdom to attend the trial ; and in default of attendance, after due service of the writ and tender of travelling expenses, the court, from which the writ issued, may certify the default to the other superior courts, and so render the defaulting witness liable to all the penalties which he

¹ 11 & 12 Vict. c. 98, s. 83.

² Sup. p. 309-315 ; cf. *Lumley v. Gye*, 23 L.J. 113, Q. B.

³ 6 & 7 Vict. c. 83, ss. 5, 6.

⁴ 17 & 18 Vict. c. 34, s. 1.

would have incurred by disobeying a similar writ issued within the jurisdiction in which he resides. This act is not to affect the power of courts to issue commissions, and its operation is confined to process from the superior courts of common law. Under this section a rule has been granted to compel a plaintiff resident in Ireland to appear as a witness for the defendant.¹ A rule under this act is absolute in the first instance.²

WHEN A WITNESS IS IN PRISON.

An application may be made to a judge of the superior courts at chambers, on affidavit, stating the imprisonment of the witness ; that his evidence is material to the applicant, and that he cannot proceed safely to trial without securing his attendance. The judge, if satisfied with the substance of the application, will then grant the applicant a writ of *habeas corpus ad testificandum*, directed to the governor of the gaol in which the prisoner is confined, and commanding him to bring up the prisoner for examination at the trial.³ Similarly, the Secretary of State, or a judge of the superior courts of common law, is empowered, on a similar application, to issue a warrant or order to bring up, as a witness in any court or criminal proceeding, any prisoner undergoing imprisonment on a criminal charge or conviction.⁴

MANNER AND TIME OF SERVICE.

The service must be on the witness personally;⁵ and

¹ *Harris v. Barber*, 25 L. J. 98, Q. B.

² *Readman v. Broers*, 19 Jur. 1052.

³ 44 Geo. 3, c. 102.

⁴ 16 & 17 Vict. c. 30, s. 9.

⁵ *Re Pyne*, 1 Dowl. & L. 703.

where several witnesses are included in one writ, the practice is to serve each witness with a ticket containing a copy, or the substance of the writ, showing him at the same time the original.¹ The service must be a reasonable time before trial; and, generally, service on the day of trial, even when the witness resides in the town, is insufficient,² unless the witness receive the service without objection.³

During his attendance the witness is privileged from arrest on civil process, and he is allowed a reasonable time in going and returning from court.⁴ If he be arrested during the time, it is a contempt of court.⁵ The privilege does not extend to an arrest on criminal process,⁶ nor where the witness is retaken by his bail, after he has finished his evidence.⁷ The privilege exists whether the process be compulsory or the attendance voluntary,⁸ but not in cases in which the witness attends rather as an unprofessional adviser than as an attorney or witness.⁹

EXPENSES OF WITNESSES.

By 5 Eliz. c. 9, s. 12, a witness is substantially rendered liable to penalties if he do not attend at the trial, after having been served with process out of a court of record, "and having tendered to him, according to his countenance or calling, such reasonable sum

¹ *Wadsworth v. Marshall*, 1 Cr. & M. 87.

² *Barber v. Wood*, 2 M. & R. 172.

³ *Maunsell v. Ainsworth*, 8 Dowl. P. C. 869.

⁴ *Montague v. Harrison*, 27 L. J. 24, C. P.

⁵ *Kimpton v. London and North Western Railway Company*, 23 L. J. 252, Exch.

⁶ *Re Douglas*, 3 Q. B. 825.

⁷ 2 Phill. 429.

⁸ *Meekins v. Smith*, 1 H. Bl. 636.

⁹ *Jones v. Marshall*, 26 L. J. 229, C. P.

of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed, . . . not having a lawful and reasonable cause to the contrary."

Accordingly, in civil proceedings, no witness, although served with a subpœna, is bound to attend at trial unless his reasonable expenses are tendered to him when he is served, or a reasonable time before trial. The sum tendered should be a reasonable compensation for his travelling expenses and subsistence during the attendance.¹ The amount allowed in the superior courts of common law is fixed by the scale approved by the judges (Reg. Hil. T. 16 Vict.), and a scale is also fixed by the county court rules. A witness will be entitled to his expenses, although a party to the cause, if he be a material and necessary witness.² It appears to be assumed that in courts of equity a witness's expenses will be taxed as at common law.³ In criminal cases a witness for the prosecution is not entitled absolutely to his expenses, and he cannot refuse to attend or give evidence on the ground that his expenses have not been tendered or paid; but in courts of final jurisdiction they are generally allowed by the court under various acts. When the witness lives out of the jurisdiction of the court, and in a distinct part of the United Kingdom, as in Scotland or Ireland, by the 45 Geo. 3, c. 92, s. 3, he is not bound to appear to give evidence in a criminal prosecution unless his reasonable expenses be paid or tendered to him at the time when he is served with the subpœna.⁴ In any other case a witness, subpœnaed on a criminal trial, is bound to attend without any tender of expenses, and will be liable to attachment for non-attendance; although, if it appeared that he could not defray the expenses of

¹ *Dowdell v. R. A. &c. Company*, 23 L. J. 369, Q. B.

² *Howes v. Barber*, 21 L. J. 254, Q. B.

³ *Tayl.* 971.

⁴ *R. v. Brownell*, 1 A. & E. 602.

his journey, the court would probably refuse to attach.¹

If a witness appear on his subpoena in a civil proceeding, he will not be compellable to give evidence until his reasonable expenses have been paid him, or tendered by the party who subpoenas him.² If he do not arrive before a cause has been referred, he will be entitled to costs in the reference, but not in the cause.³

A successful party may pay a witness his costs, and recover them from the defeated party.⁴ But an immaterial witness, who has been rejected by a judge or arbitrator, cannot claim his costs as between party and party.⁵

If the witness, after being subpoenaed, be not required to attend, and has incurred no expense, he must refund.⁶

As to a party's claim to costs for witnesses, see below.⁷

NON-ATTENDANCE OF WITNESSES.

In criminal cases and examinations under commissions, depositions may generally supply the place of an absent witness ; but, in civil proceedings generally, a party has no right to claim a postponement of a trial on the ground that a witness whom he had subpoenaed does not appear. But when a witness is material, and

¹ 2 Phill. 441.

² *Newton v. Harland*, 1 M. & G. 956.

³ *Fryer v. Sturt*, 24 L. J. 154, C. P.

⁴ *Hale v. Bates*, 28 L. J. 14, Q. B.

⁵ *Galloway v. Kenworth*, 23 L. J. 218, C. P.

⁶ *Martin v. Andrews*, 26 L. J. 39, Q. B.

⁷ *Jewell v. Parr*, 25 L. J. 179, C. P.

a satisfactory case is presented to a judge on affidavit of the facts, and the applicant has been guilty of neither fraud nor laches, a judge will usually grant a postponement of a trial, with the consent of parties, till a later day of the sittings, if the business of the court permit; otherwise the party must proceed; or, if a plaintiff, he may withdraw the record.

CHAPTER II.

ON THE EXAMINATION OF WITNESSES.

WHEN a witness has been placed in the witness box, and no objection taken or sustained against his competency by the adverse party, he must be sworn by the officer of the court, or, when an affirmation is allowed, he must declare an affirmation.¹ He may then be submitted to three distinct kinds of examination as to his knowledge of the facts which he is called to prove. 1st. He may be examined in chief by the party who calls him. 2nd. He may be cross-examined by the adverse party. 3rd. He may then be re-examined by the party who calls him. Rules are established for the general conduct of each of these modes of examination, and it is the purpose of this chapter to state and explain them.

THE EXAMINATION IN CHIEF.

The object of the examination in chief is to elicit from the witness all the material facts which tend to prove the case of the party who calls the witness. In such a case, as the presumption and the ordinary fact are that the witness, having been chosen by the party who calls him, is favourable to his cause, and therefore

¹ Cf. sup. p. 23.

likely to overstate or misstate the circumstances which conduce to establish the party's case, it is a principal rule that—

On an examination in chief, a witness must not be asked leading questions.

The simple meaning of this rule is that a party, who calls a witness to prove a case, must not suggest answers to the witness, nor frame his questions in such a manner that the witness by answering merely "Yes," or "No," shall give the reply and the evidence which the party wishes to elicit. A question is said to be leading when the words, which the witness is expected and required to utter, are put into his mouth; and such a question is inadmissible, because the object of calling witnesses and examining them *vivâ voce* in open court is, that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest. If, therefore, a party or his counsel were allowed to put a question to their own witness which the latter might answer by a mere affirmative or negative, it is apparent that the evidence would be the statement of the party, and not that of the witness. Such a course would strike radically at the credibility of all oral evidence, and therefore it is a sound and established rule that, on the examination in chief, leading questions must not be asked.

The rule may be exemplified thus: A. B. is charged with stealing a watch, the property of C. D. E. F. saw A. B. take the watch from the counter in C. D.'s shop. Now, if the counsel for the prosecution, in order to prove the theft, were to call E. F. and ask him "whether at such a time he saw A. B. enter C. D.'s shop and take the watch from the counter," it is plain that such a question would be leading, because it would at once suggest to the witness the answer which he was expected to make, and the prisoner would be convicted by an answer simply in the affirmative. The

answer to the latter branch of the question involves the whole question of guilt, and the substance of the charge. The witness ought, therefore, to be asked, not whether he saw the prisoner commit the offence, but what he saw the prisoner do at the time when and at the place where it is alleged that the offence was committed. It is also to be noticed, that questions are not objectionable as leading questions, except when they affect the substance of an inquiry and an issue. Thus, in the above example, it would be quite proper, for the purpose of saving the time of the court, to ask the witness whether at a specified time he entered C.D.'s shop, and even whether at that time he saw the prisoner there, and near the counter. Such questions are quite immaterial, and may therefore be put in the shortest and most direct manner possible, because the answer cannot inculcate the prisoner in any proximate degree, nor even at all. But when the real issue is approached, and when it is sought to fix guilt on the prisoner, the witness must be asked, not whether he saw the prisoner do a certain act, but what he saw the prisoner do. Such a course of examination is clearly necessary to prevent, at least in some measure, the possibility of collusion between a prosecutor, or a party, and his witness.

It may be noticed in this place, that where an adverse party has reason to suspect collusion between his opponent's witnesses, or even where he is without any ground of reasonable suspicion, he may apply to the court, in any civil or criminal proceeding, to order all such witnesses, or any of them, with the exception of the one under examination, to leave the court; and such an order, although apparently not absolutely a matter of right, is never refused to the applicant.¹ The order does not usually extend to an attorney in the cause, nor to scientific witnesses. If a witness remain

¹ *Southey v. Nash*, 7 C. & P. 632; *R. v. Murphy*, 8 C. & P. 307; *s. v. R. v. Cook*, 13 How. St. Tr. 348.

in court after such an order, it seems that he may be attached; but his evidence will be received, although subject to strong observation.¹

The rule that leading questions must not be asked on an examination in chief is neither inflexible nor universal. The conduct of all *vivâ voce* examination is at all times subject to the discretion and direction of the judge; and, although he will enforce vigilantly the general rule, yet there are also various cases in which he will suffer it to be relaxed. The foundation of the rule is, that the witness is favourable to the party who calls him. Whenever, therefore, it appears that the witness is hostile, or that his evidence cannot be extracted by general questions as to his knowledge of material facts, the judge may, and will, permit the party, or his counsel, to put a leading question to him point blank as to a material fact, and require him to answer it in the affirmative or negative. In such a case an examination in chief frequently assumes the form of a cross-examination.

So, also, where a question from its nature cannot be put except in a leading form, the judge will allow it to be put. Thus, where an offence is proved, a prisoner may be pointed out to a witness, and the latter may be asked whether the prisoner was the man whom the witness saw commit the offence.²

So, also, where a witness has manifestly or apparently forgotten a circumstance, and all indirect attempts to recall it to his mind have failed, the circumstance may be put to him in a leading form, and he may be asked whether he remembers it. Thus, where a witness stated that he could not remember the names of certain persons, but that he should remember and be able to identify them if they were read to him, Lord Ellenborough allowed this to be done.³

On this principle it is allowable to hand a witness a

¹ *Chandler v. Horne*, 2 M. & R. 423.

² *R. v. Watson*, 2 Stark. 128.

³ *Acerro v. Petroni*, 1 Stark. 100.

memorandum in his own writing, containing an account of the disputed facts, and to ask him to peruse it and give his evidence from his memory, as refreshed by his own memorandum. The circumstances under which this class of evidence is admissible have been discussed already: (*supra*, pp. 361-365.) Where such a memorandum is used, the opposite counsel has a right to inspect it, and to cross-examine the witness on it.¹

The next important rule, under the head of the examination in chief, is that—

A witness must be asked only questions of fact which are relevant and pertinent to the issue; and he cannot be asked irrelevant questions, or questions as to his own inferences from, or personal opinion of, facts.

This rule, and the exception to it in the case of skilled or scientific witnesses, was considered in the sixth chapter of the first part of this treatise; and it is sufficient in this place to refer to it.

THE RIGHT OF A PARTY TO DISCREDIT HIS OWN WITNESSES.

The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 22) determines the conditions under which a party to a civil proceeding may contradict by other evidence the statement of a witness who has proved unexpectedly adverse to the party who calls him. That section enacts that a “party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he

¹ *Doe d. Church v. Perkins*, 3 T. R. 749.

may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." In order that a party may have the benefit of this section, the evidence of the witness must not only be unfavourable, but hostile, to the party who calls him. In other words, the judge must hold not only that the result of the evidence is unfavourable to the party who calls the witness, but that the mode and tone in which the evidence is given indicate that the witness has a hostile feeling towards the party who has called him, believing the witness to be friendly.¹

The above enactment, by s. 103, extends to every civil court in England and Ireland, but not to criminal courts. In criminal courts it appears that a witness who persists in giving an answer at variance with his deposition cannot be contradicted by putting in the deposition, but it may be shown him to refresh his memory; and the question may be repeated in a leading form.²

Where a prisoner calls a witness who criminales another prisoner, the latter has a right to cross-examine. But it is doubtful whether the latter has such a right when the evidence is not criminatory.³

In equity a witness may be contradicted under the above section before an examiner.⁴

¹ *Greenough v. Eccles*, 28 L. J. 160, C. P.

² *R. v. Williams*, 6 Cox C. C. 343.

³ *R. v. Burdett*, 24 L. J. 64, M. C.

⁴ *Buckley v. Cooke*, 24 L. J. 24, Ch.

THE CROSS-EXAMINATION.

When a witness has been examined in chief by the party who calls him, the opposite party, or his counsel, has a right to cross-examine him. This right is discretionary, and when the examination in chief has resulted in clear, conclusive, or unimpeachable evidence, it will be prudent for the adverse party not to claim his privilege; for cross-examination in such a case, instead of weakening the evidence, generally strengthens and confirms it. So, where the adverse party does not dispute the truth of his opponent's case, but relies on a justification or an excuse, he will not think it desirable, generally, to cross-examine a witness.

As the object of the examination in chief is to lay all the material evidence of a case before the court, so the object of cross-examination is to impeach the accuracy, credibility and general value of that evidence; to sift, detect and expose discrepancies, or to elicit suppressed facts, which weaken or qualify the case of the examining party, and support the case of the cross-examining party. It is therefore, generally, a rule that on cross-examination an adverse witness may be asked leading questions.¹

The reason for excluding leading questions on the examination in chief, on which the witness is generally favourable to the examiner, does not usually apply to cross-examination, on which the witness is as generally hostile to the cross-examiner. Accordingly, on cross-examination, a witness may be asked in direct words as to the truth or falsehood of a matter which bears substantially on the issue. Thus, in debt for goods, when the defence is an unexpired term of credit, a witness who proves the sale and the debt could not properly be asked whether he sold a particular description of goods to the defendant at a certain price, and

¹ *R. v. Hardy*, 24 How St. Tr. 755.

for present payment; but he should be asked separately whether he sold any goods at all, and, if so, what they were, and what were the terms of payment. But on cross-examination he might be asked about the goods specifically and by name, and whether it was not understood between the parties that the purchaser was to have a specific time, such as a year, of credit.

But the rule under consideration appears to be, and is practically, subject to the restriction that a witness, even on cross-examination, can be asked leading questions only if he be, or appear to be, adverse to the cross-examiner; and where the witness appears to be favourable to him, the court will sometimes, and even frequently, not suffer even a cross-examiner to lead his opponent's witness. Thus, on Hardy's trial, a witness for the prosecution, on evincing a favourable disposition towards the prisoner, was asked by his counsel whether, at a meeting, certain persons had not used certain specified expressions which, if uttered, would have been favourable to the defence. But the court held that in such a case counsel could not put words into the witness's mouth; and Buller, J., said: "You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but you cannot go the length of putting into the witness's mouth the very words which he is to echo back again."¹

In examining in chief, the object of the party should be to elicit from the witness all the material facts which he is called to prove, and to take especial care that the witness does not stand down before the latter has proved that part of the case which he is expected to prove. Generally, it is desirable and proper to ask him only such questions as will confine him to the matter in issue, and such as will elicit his own personal and independent account of it. Unless he deviate into hearsay or other inadmissible kinds of evidence, or unless he ramble into utterly irrelevant matters, it is always the

¹ 24 How. St. Tr. 659.

right, as it is generally the prudent, course not to interrupt a witness when examining him in chief. If he be hostile or dishonest, a more stringent style of examination may be adopted ; but if he be favourable, or even adverse, but honest, a party will seldom lose anything by suffering a witness to give his own ungarbled version of a circumstance ; and such a course will always be most satisfactory to the court, and most conducive to the administration of justice. In criminal cases, especially where a prisoner is not defended, it is the practice, and probably the duty, of a prosecuting counsel, to ask a witness questions which are favourable in their object to the prisoner ; for the duty of a prosecuting counsel is to lay all material evidence impartially before the court, and not to press a conviction.

In all such cases, and in cross-examination as on the examination in chief, the court will exercise its discretion as to how far it is desirable and consistent with the ends of justice to allow a question to be put in a leading form. It has been stated, however, by Alderson, B., that the right to lead on cross-examination exists whether the witness be favourable or not.¹

Great latitude is allowed in the questions which a party is permitted and entitled to ask on cross-examination, and he will seldom be stopped by the court unless the question be manifestly irrelevant to the case, and calculated neither to qualify the examination in chief, nor to impeach the credit of the witness. It is manifest that questions, which would be clearly irrelevant on the examination in chief, may be of the highest importance when asked on cross-examination. Thus, generally, on cross-examination a witness may be asked any question, the answer to which may have a tendency to affect his credit ; but he will not always be obliged to answer such questions.² Thus,

¹ *Parker v. Moon*, 7 C. & P. 408 ; cf. *Stark. Ev.* 197.

² *Sup.* p. 68-72.

generally, he may be asked questions which affect his veracity or his memory; such as whether he has been convicted on a trial on a criminal charge; whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him; whether he be not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; and whether his memory is not defective generally, or, as to the particular transaction. Such questions are within the circumference of the issue, although not within that inner circle to which the examination in chief is confined.

But when the cross-examination is rambling, prolix, or irrelevant, the court may and will properly interfere to stop it. But where it is apparently irrelevant, and the cross-examiner undertakes to show subsequently that the question is material, it will generally be allowed.¹

Generally a cross-examination will be held irrelevant where it tends neither to contradict nor to qualify the result of the examination in chief, nor to impeach the credit of the witness. It is also irrelevant in civil proceedings, when it is sought to infer an act of a party from his dealings with a third party. Thus, in an action for a nuisance, the defendant's witness cannot be asked on cross-examination whether compensation for a similar nuisance has not been paid by the defendant to a third person in the same position as the plaintiff.² So, evidence of the mode in which a party has contracted with third parties is no evidence of the mode in which he contracted with the adverse party in a similar transaction; and the latter cannot ask a witness on cross-examination as to the terms on which the party contracted with such third parties.³ Neither can a witness be asked as to the statement or admission of a third person, to show that a liability belongs to

¹ *Haigh v. Belcher*, 7 C. & P. 389.

² *Kennenta v. Hamilton*, 7 Cl. & Fin. 122.

³ *Hollingham v. Head*, 27 L. J. 241, C. P.

such third person, and not to the party charged; for such evidence would be hearsay.¹ But he may be asked whether such a third person is not the person to whom a credit was given, or who was dealt with as the party originally liable.² And it seems that he might be asked such a question as the foregoing, in order to test his memory or credibility.³

ON IMPEACHING THE CHARACTER OF A WITNESS.

In order to impeach the character of a witness, he may be asked on cross-examination whether he has committed any crime, or been guilty of other immoral conduct; but generally, if he answer in the negative, the fact cannot be proved by the cross-examiner unless it be material to the issue. In other cases the answer of the witness is conclusive.⁴ Generally, evidence of bad character cannot be given in evidence; but an exception to this rule in civil proceedings has been recently instituted by the Common Law Procedure Act, 1854, which enacts that "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five

¹ *Watts v. Lyons*, 6 M. & G. 1047.

² 2 Phill. 470.

³ *Hollingham v. Head*, sup. p. 445.

⁴ *Ferit v. Hill*, 23 L. J. 185, C. P.

shillings and no more shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.”¹ This act extends to civil proceedings only.²

If a witness be asked on cross-examination whether he ever made a former verbal statement, as to matters connected with the issue, different to that which he has made at the trial, and if he answer in the negative, evidence may be given that he has made such a former statement; but it is necessary to lay a foundation for such evidence by first stating to the witness all the circumstances under which he is supposed to have made such a former and contradictory statement, in order that he may have an opportunity of refreshing his memory, and explaining the discrepancy.³ Thus, in a late case, Alderson, B., said: “A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness’s testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him. . . . You may ask him any question material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue.”⁴ This principle has also been extended by the Common Law Procedure Act, 1854, s. 23, which enacts that “if a witness upon cross-examination as to a former statement made by him, relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but, before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he

¹ 17 & 18 Vict. c. 125, s. 25.

² Ibid. s. 103.

³ *Crowley v. Page*, 7 C. & P. 791.

⁴ *Attorney-General v. Hitchcock*, 1 Exch. 102.

must be asked whether or not he has made such statement."

In other cases, where a witness is asked on cross-examination a question which is not material to the subject-matter of the case, and which is intended merely to impeach his veracity, it was long doubted, and is still doubtful in some measure, how far evidence can be given to contradict an answer to such immaterial matter. There are authorities both ways; but the modern doctrine appears to be that, although such evidence cannot be received to disprove a statement of the witness as to an irrelevant fact, it may be given in some cases to contradict an answer to a question which tends to impeach his general veracity.

When it is sought to impeach the veracity of a witness, evidence cannot be given of any particular acts of falsehood or dishonesty, because it is presumed that a witness does not attend prepared to rebut particular charges, nor to justify the whole course and details of his private life. A witness, therefore, who is called, as is allowable, to impeach the veracity of another witness, cannot be asked as to particular acts in the life of the impeached witness, but generally only whether he would believe him on his oath.¹ In such a case the party calling the impeached witness may re-establish his character by calling witnesses to his general good character.²

When it is proposed to contradict a former statement in writing by a witness, the existing rule under the Common Law Procedure Act, 1854, s. 24, as to courts of civil judicature, is the following:—

"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be

¹ *R. v. Bropham*, 4 C. & P. 392.

² *Annerley v. Anglesea*, 17 How. St. Tr. .

given, be called to those parts of the writing which are to be used for the purpose of contradicting him ; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit.”¹

In criminal proceedings the following rules, as laid down by the judges, are in force² :—

1. “Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner’s counsel, be asked whether he did or did not in his deposition make such a statement, until the deposition has been read in order to manifest whether such statement is or is not contained therein ; and such deposition must be read as part of the evidence of the cross-examining counsel.

2. “After such deposition has been read, the prisoner’s counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition ; after which the counsel for the prosecution may examine the witness, and, after the prisoner’s counsel has addressed the jury, will be entitled to the reply ; and in case the counsel for the prisoner comments upon any supposed variance or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. “The witness cannot in his cross-examination be compelled to answer whether he did or did not make such a statement before the magistrate, until after the deposition has been read, and it appears that it contains no mention of such statement ; in that event the counsel for the prisoner may proceed with his cross-examination, and, if the witness admits such a statement to have been made, he may comment upon such

¹ See *Darby v. Ousley*, 25 L. J. 227, Ex.

² 7 C. & P. 676. “

omission, or upon the effect of it upon the other part of his testimony ; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."

Under these rules, when it is sought to prove a discrepancy between the evidence of the witness and the evidence at the trial, he cannot be asked whether he ever made a different statement, without it being added "except when you were before the magistrate" or "coroner."¹ But when it appears that the statement was not taken down before the magistrate, the witness may be examined personally as to its nature.

As to questions which a witness may refuse to answer, see sup. p. 68-72.

In criminal cases, where a prisoner calls witnesses only to character, it is not usual for the prosecuting counsel to cross-examine them, although strictly he has the right to do so.

THE RE-EXAMINATION.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination, for the purpose of reconciling any discrepancies that may exist between the evidence on the examination in chief, and that which has been given on cross-examination; or for the purpose of removing, or diminishing, any suspicion that the cross-examination may have cast on the evidence in chief. But the re-examining counsel cannot ask the witness as to new

¹ *R. v. Holden*, 8 C. & P. 609.

• matter; in other words, the questions which may be asked must be exclusively such as are connected with, and arise out of, the cross-examination; and no questions can be asked on re-examination which tend to introduce new evidence which might have been given on the examination in chief.¹ Accordingly, in the *Queen's case*, Lord Tenterden, in delivering the judgment of the court, said: "I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness." It is therefore held that a witness who has been cross-examined as to a conversation with a party, cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred.² But where a party has omitted to put a question on the examination in chief, a judge will usually put it, if requested to do so by counsel. The judge has also a discretionary power to recall a witness at any time for the purpose of putting a question to him.

The re-examination practically closes the examination of a witness; although, in rare cases, witnesses may be, and are, called to justify the character of an impeached witness, or to impeach the character of an impeaching witness.

The party who calls a witness, or who produces any kind of evidence, gives the adverse party the right of reply, and he will have no right to re-examine a witness if the adverse party decline to cross-examine. In civil proceedings, under the new common law procedure,

¹ *Queen's case*, 2 B. & B. 297.

² *Prince v. Samo*, 7 A. & E. 627.

counsel, or a party, have a right to sum up the evidence of their witnesses whenever they would not otherwise have a right of reply. This is the new practice under the Common Law Procedure Act, 1854, the eighteenth section of which enacts that—

“Upon the trial of any cause the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of the case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence, if any; and the right to reply shall be the same as at present.”

Under this section, when the judge rules that there is no evidence to go to the jury, a party has no right to sum up.¹ Unless, at the close of a plaintiff's case, the defendant announce his intention to adduce evidence, it seems that he loses the right to do so.²

This treatise on the Law of Evidence ends here. It had been intended originally to include in it a practical account of the course of evidence in different courts, and of the nature and amount of evidence which are required in particular actions, &c. But it was found necessary to abandon this plan in consequence of the length to which the work had extended already. It is trusted that, in its present form, it will be found to comprise a sufficient account of such practical principles as are of most frequent occurrence and importance in the courts.

Hodges v. Ancrum, 24 L. J. 247, Exch.

Per Alderson, B.: *Darby v. Ousley*, 25 L. J. 231, Ex.

APPENDIX.

LORD DENMAN'S ACT.

6 & 7 VICT. CAP. 85.

An Act for improving the Law of Evidence.—[22nd August, 1843.]

I. Witnesses not to be excluded from giving evidence by incapacity from crime or interest—Proviso—Not to repeal any provision in 7 Will. 4 & 1 Vict. c. 26—In courts of equity defendant may be examined on behalf of the plaintiff or any co-defendant, &c.]—Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: Now therefore be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the

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matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided also, that this act shall not repeal any provision in a certain act passed in the session of Parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled *An Act for the Amendment of the Laws with respect to Wills*: provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

II. *In legal proceedings not necessary to state that jurors had made affirmation.*.]—And be it enacted, that wherever in any legal proceedings whatever legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath; but it may be stated that they served as jurymen, in the same manner as if no act had passed for enabling persons to serve as jurymen without oath.

III. *As to suits commenced before passing this act.*.]—And be it enacted, that nothing in this act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this act.

IV. *Not to extend to Scotland.*.]—And be it enacted, that nothing in this act shall extend to Scotland.

DOCUMENTARY EVIDENCE ACT.

8 & 9 VICT. CAP. 113.

An Act to facilitate the Admission in Evidence of certain official and other Documents.—[8th August, 1845.]

I. *Certain documents to be received in evidence without proof of seal or signature, &c., of person signing the same.*—Whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, byelaws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes: and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such and the like documents: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that whenever by any act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of Parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

II. *Courts, &c, to take judicial notice of signature of equity*

or common law judges, &c.—And be it enacted, that all courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

III. *Copies of private acts printed by Queen's printer, journals of Parliament, and proclamations, admissible as evidence.*—And be it enacted, that all copies of private and local and personal acts of Parliament not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either house of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.

IV. *Persons forging seal, stamp, or signature of certain documents, or printing any private act with false purport, guilty of felony.*—Provided always, and be it enacted, that if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, byelaw, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false

or counterfeit, or if any person shall print any copy of any private act or of the journals of either House of Parliament, which copy shall falsely purport to have been printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not more than three nor less than one year, with hard labour: provided also, that whenever any such document as before mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorized, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster on application being made for that purpose.

V. *Not to extend to Scotland.*—And be it enacted, that this act shall not extend to Scotland.

VI. *Alteration of act.*—And be it enacted, that this act may be repealed, altered, or amended during this present session of Parliament.

VII. *Commencement of act.*—And be it enacted, that this act shall take effect from the first day of November next after the passing thereof.

LAW OF EVIDENCE AMENDMENT ACT.

14 & 15 VICT. CAP. 99.

An Act to amend the Law of Evidence.—[7th August, 1851.]

WHEREAS it is expedient to amend the law of evidence in

divers particulars : be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. *Recited proviso in s. 1 of 6 & 7 Vict. c. 85 repealed.*—So much of section one of the act of the sixth and seventh years of her present Majesty, chapter eighty-five, as provides that the said act shall “not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part,” is hereby repealed.

II. *Parties to be admissible witnesses.*—On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

III. *Nothing herein to compel person charged with criminal offence to give evidence tending to criminate himself, &c.*—But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

IV. *Not to apply to proceedings in consequence of adul-*

tery, &c.—Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

V. *Nothing to repeal any provisions of 7 Will. 4 & 1 Vict. c. 26.*—Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of Parliament holden in the seventh year of the reign of King William the Fourth and the first year of the reign of her present Majesty.

VI. *Common law courts authorized to compel inspection of documents whenever equity would grant discovery.*—Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.

VII. *Foreign and colonial acts of state, judgments, &c., proveable by certified copies, without proof of seal or signature or judicial character of person signing the same.*—All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be

proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

VIII. *Apothecaries' certificates admissible without proof of seal.*—Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

IX. *Documents admissible without proof of seal, &c., in England or Wales equally admissible in Ireland.*—Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the per-

son appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

X. Documents admissible without proof of seal, &c., in Ireland equally admissible in England and Wales.—Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XI. Documents admissible without proof of seal, &c., in England, Wales, or Ireland equally admissible in the colonies.—Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XII. Registers of British vessels and certificates of registry admissible as prima facie evidence of their contents, without proof of signature, &c.—Every register of a vessel

kept under any of the acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of oneshillings; and every such register or such copy of a register, and also every certificate of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry when the said certificate is produced.

XIII. *Where necessary to prove conviction or acquittal of person charged, not necessary to produce record, but may be certified under hand of clerk of court.*—And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: be it enacted, that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

XIV. *Examined or certified copies of documents admissible in evidence.*—Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a

copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

XV. *Certifying a false document a misdemeanor.*]—If any officer authorized or required by this act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

XVI. *Court, &c., may administer oaths.*]—Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

XVII. *Persons forging seal, stamp, or signature of certain documents, or wilfully uttering the same, guilty of felony.*]—If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour; and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person

for such period and subject to such conditions as to the said court or persons shall seem meet ; and every person who shall be charged with committing any felony under this act, or under the act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody ; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

XVIII. *Act not to extend to Scotland.*—This act shall not extend to Scotland.

XIX. *Interpretation of "British colony."*—The words "British colony" as used in this act shall apply to all the British territories under the government of the East India Company, and to the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, wheresoever and whatsoever.

XX. *Commencement of act.*—This act shall come into operation on the first day of November in the present year.

IMPROVEMENT OF THE JURISDICTION OF EQUITY ACT.

15 & 16 VICT. CAP. 86, SS. 29—40.

An Act to amend the Practice and Course of Proceeding in the High Court of Chancery.—[1st July, 1852.]

XXIX. *Plaintiff, where suits by bill at issue, may give notice to defendant to adduce evidence orally or by affidavit.*—When any suit commenced by bill shall be at issue, the plaintiff shall, within such time thereafter as shall be pre-

scribed in that behalf by any general order of Chancellor, give notice to the defendant that he desire the evidence to be adduced in the cause shall be taken orally or upon affidavit, as the case may be; and if the plaintiff shall desire the evidence to be adduced upon affidavit, the defendant, or some or one of the defendants, if more than one, shall not, within such time as shall be appointed in that behalf by any general order of the Lord Chancellor, give notice to the plaintiff or his solicitor that he desire the evidence to be oral, the plaintiff and defendant respectively shall be at liberty to verify their respective affidavits.

XXX. *Evidence may be taken orally if required by the court in certain cases make an order, &c.*—If the court of the parties to any suit commenced by bill desire that the evidence should be adduced orally, and gives notice to the opposite party as hereinbefore provided, that the evidence shall be taken orally, in the manner hereinafter provided, that if the evidence be required to be taken orally by a party without a sufficient interest in the question, the court may, upon application in that behalf made, make such order as shall be just.

XXXI. *Witnesses to be examined by one of the judges of the court in the presence of the parties.*—All witnesses shall be examined orally under the provisions of this Act, or by or before one of the examiners of the court, the examiner being furnished by the plaintiff with a copy of the bill, and of the answer, if any, in that behalf made, and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.

XXXII. *Depositions to be taken down in writing, and signed by the witness, who shall sign the same in presence of the parties, but if he refuse to sign, examiner may, and in a special matter he may think fit.*—The depositions taken at any such oral examination as aforesaid shall be taken down in writing by the examiner, and signed by him in presence of the parties, but if he refuse to sign, the examiner may, and in a special matter he may think fit, sign the same.

in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit; provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

XXXIII. *If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted—Proviso as to witness demurring to questions.*—If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Record Office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court.

XXXIV. *Original depositions to be transmitted to the Record Office, and filed.*—When the examination of witnesses before any examiner shall have been concluded, the

original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the Record Office of the said court, to be there filed, and any party to the suit may have a copy thereof or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any general order of the Lord Chancellor in that behalf.

XXXV. *Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths.*]—It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the court shall have the like power of administering oaths as commissioners now have under commissions issued by the court for the examination of witnesses.

XXXVI. *Affidavits as to particular facts, &c., may be used.*]—Notwithstanding that the plaintiff or the defendant in any suit in the said court may have elected that the evidence in the cause should be taken orally, affidavits by particular witnesses, or affidavits as to particular facts or circumstances, may, by consent, or by leave of the court obtained upon notice, be used on the hearing of any cause, and such consent, with the approbation of the court, may be given by or on the part of married women or infants or other persons under disability.

XXXVII. *Affidavits to be divided into paragraphs numbered.*]—Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject.

XXXVIII. *Evidence oral or by affidavit, on both sides to be closed within time prescribed by general order—Witnesses by affidavit to be subject to oral cross-examination, and afterwards to re-examination—Witnesses bound to attend—As to expenses attending cross-examinations, &c.*]—The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the Lord Chancellor, but with power to the court to enlarge the same as it may see fit; and after the time fixed for closing the evidence

no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the court previously obtained for that purpose : provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed ; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum* before such examiner ; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct.

XXXIX. *Court may require the production and oral examination before itself of any witness, &c., and determine payment of the costs.*—Upon the hearing of any cause depending in the said court, whether commenced by bill or by claim, the court, if it shall see fit so to do, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit.

XL. *Any party in a cause may by subpœna require attendance of any witness before an examiner.*—Any party in any cause or matter depending in the said court may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to

the hearing of a cause; and any party having affidavit to be used or which shall be used on a motion, petition, or other proceeding before the court bound on being served with such writ to attend the examiner, for the purpose of being cross-examined; provided always, that the court shall always have a discretionary power of acting upon such evidence as may be before the time, and of making such interim orders, or such orders as may appear necessary to meet the justice of the case.

COMMON LAW PROCEDURE ACT,

17 & 18 VICT. CAP. 125, SS. 18—31.

An Act for the further Amendment of the Process, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, of the Superior Courts of Common Law of the Palatine of Lancaster and Durham.—[12th 1854.]

XVIII. *Speeches to the jury.*—Upon the trial of any cause, the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, at the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of the case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence; and the right to reply shall be the same as at present.

XIX. *Power to adjourn trial.*—It shall be lawful for any court or judge, at the trial of any cause, where the court may deem it right for the purposes of justice, to grant an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or the judge think fit.

XX. *Affirmation instead of oath in certain cases.*—Any person called as a witness, or required or desiring to

an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; *videlicet*,

“I, A. B., do solemnly sincerely and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely and truly affirm and declare, &c.”

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

XXI. *Persons making a false affirmation to be subject to the same punishment as for perjury.*]—If any person making such solemn affirmation or declaration shall wilfully, falsely and corruptly affirm or declare any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

XXII. *How far a party may discredit his own witness.*]—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIII. *Proof of contradictory statements of adverse witness.*]—If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such

proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIV. *Cross-examination as to previous statements in writing.*]—A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

XXV. *Proof of previous conviction of a witness may be given.*]—A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

XXVI. *Attesting witness need not be called, except in certain cases.*]—It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

XXVII. *Comparison of disputed writing.*]—Comparison of a disputed writing with any writing proved to the satis-

faction of the judge to be genuine shall be permitted to be made by witnesses ; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

XXVIII. *Provision for stamping documents at the trial.*—Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document to call the attention of the judge to any omission or insufficiency of the stamp ; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.

XXIX. *Officer of the court to receive the duty and penalty—13 & 14 Vict. c. 97.*—Such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds ; and an entry of the fact of such payment and of the amount thereof shall be made in a book kept by such officer ; and such officer shall, at the end of each sittings or assizes (as the case may be), duly make a return to the Commissioners of the Inland Revenue of the moneys, if any, which he has so received by way of duty or penalty, distinguishing between such moneys, and stating the name of the cause and of the parties from whom he received such moneys, and the date, if any, and description of the document for the purpose of identifying the same ; and he shall pay over the said moneys to the Receiver General of the Inland Revenue, or to such person as the said commissioners shall appoint or authorize to receive the same ; and in case such officer shall neglect or refuse to furnish such account, or to pay over any of the moneys so received by him as aforesaid, he shall be liable to be proceeded against in the manner directed by the eighth section of an act passed in the session of Parliament holden in the thirteenth and four-

17 & 18 VICT. CAP. 12.

teenth years of the reign of her present Majesty, *An Act to repeal certain Stamp Duties, as in lieu thereof, and to amend the Laws relating to Stamp Duties*; and the said commissioners shall cause the production of the receipt hereinbefore mentioned in respect of such documents to be stamped with the stamps in respect of the sums so paid as aforesaid, always, that the aforesaid enactment shall not apply to any document which cannot now be stamped with a stamp thereof on payment of the duty and a penalty.

XXX. *No document under this act to require a stamp.* No document made or required under the provisions of this act shall be liable to any stamp duty.

XXXI. *No new trial for ruling as to stamp duty.* No new trial shall be granted by reason of the ruling that the stamp upon any document is sufficient, where the document does not require a stamp.

EVIDENCE BY COMMISSIONERS.

22 VICT. CAP. 20.

An Act to provide for taking Evidence in proceedings pending before Tribunals in the Colonies and Dominions in Places out of the Jurisdiction of the Courts of Justice.—[19th April, 1859.]

Whereas it is expedient that facilities be afforded for taking evidence in or in relation to actions and proceedings pending before tribunals in her Majesty's Colonies and Dominions in places in such dominions out of the jurisdiction of the courts of justice: be it enacted by the Queen's Majesty, by and with the advice and consent of the Privy Council, that the following provisions shall have effect in relation to the said tribunals:—

I. *Order for examination of witnesses on oath in relation to any suit pending before a court in Her Majesty's possessions.*—Where upon an application made to any court for the purpose it is made to appear to any court

authority under this act that any court or tribunal of competent jurisdiction in her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge.

II. *Penalty on persons giving false evidence.*]—Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

III. *Payment of expenses.*]—Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial.

IV. *Power to persons to refuse to answer questions to criminate himself, or to produce documents.*]—Provided also, that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which, or by a judge whereof, or before the judge by whom the order for examination was made, would

be entitled to ; and that no person produce under any such order as other document that he would not at a trial of such a cause.

V. *Certain courts and judges to act.*]—Her Majesty's superior or Westminster and in Dublin respectively in Scotland, and any supreme Majesty's colonies or possessions in any such court, and every judge in session who, by any order of her Majesty, be appointed for this purpose, shall and judges having authority under

VI. *Power to judges to frame rules to provisions of this act.*]—It shall be the duty of the Chancellor of Great Britain, with the judges of the courts of common law in England, and for Ireland, with the assistance of two of the judges of the courts of common law at Dublin, and for two of the judges at the High Court of Justiciary in Scotland, and for the chief justice of the supreme court in any of her Majesty's colonies or possessions abroad, so far as relates to the power to frame such rules and orders as may be proper for giving effect to the provisions of this act in regulating the procedure under the

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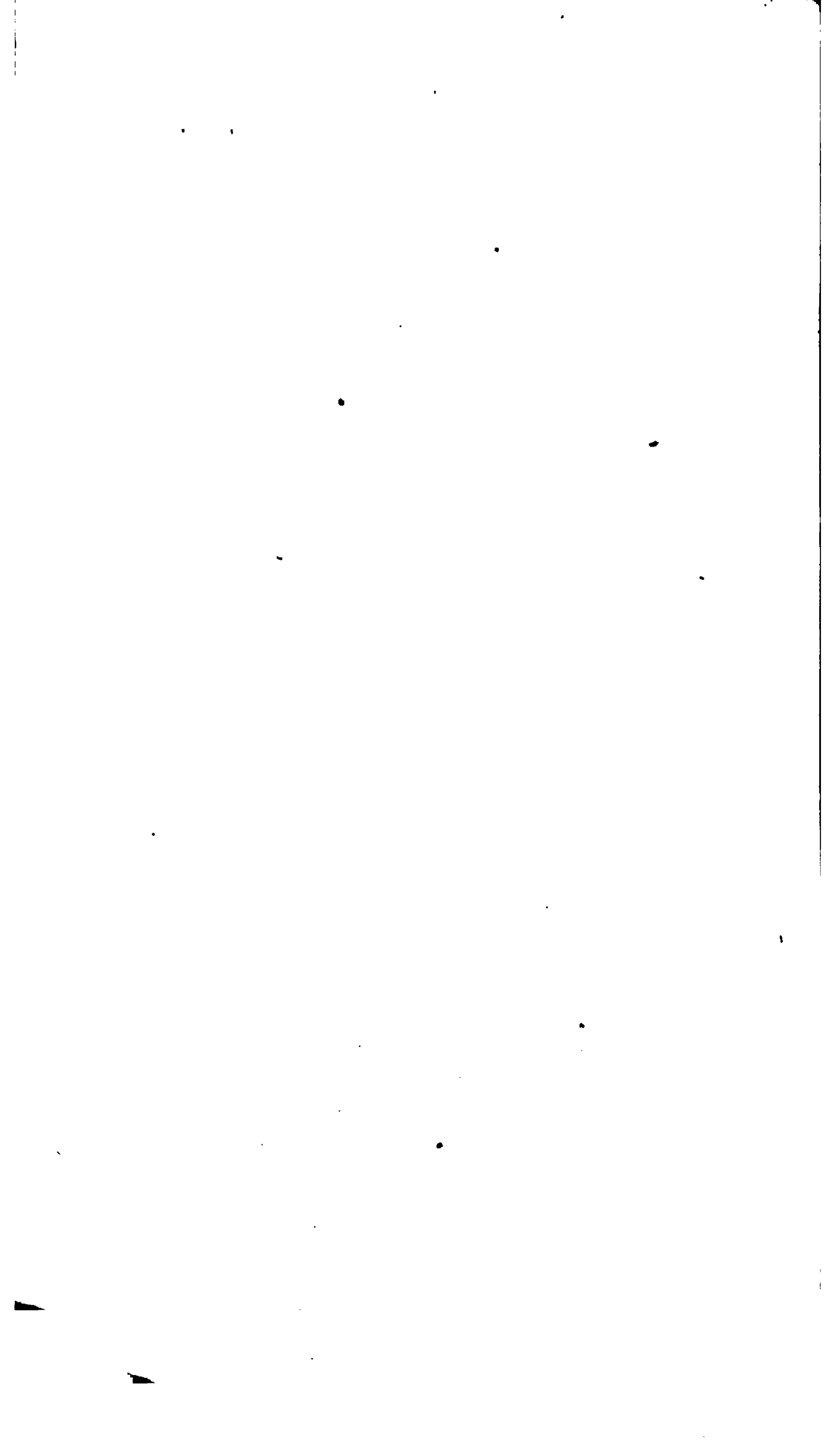
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